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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1962

No. 65

WEYERHAEUSER STEAMSHIP COMPANY,
PETITIONER,

vs.

UNITED STATES.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED JANUARY 19, 1962

CERTIORARI GRANTED MARCH 5, 1962

No. 17187

**United States
Court of Appeals**
for the Ninth Circuit

UNITED STATES OF AMERICA,

Appellant,

vs.

WEYERHAEUSER STEAMSHIP COMPANY
AND ST. PAUL FIRE & MARINE INSUR-
ANCE CO., AND FIREMAN'S FUND INSUR-
ANCE CO.,

Appellee.

Transcript of Record

Appeal from the United States District Court for the
Northern District of California,
Southern Division

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the United States District Court for the Northern
District of California, Southern Division

In Admiralty

No. 27359

WEYERHAEUSER STEAMSHIP COMPANY, a
corporation,

Libelant,

vs.

UNITED STATES OF AMERICA.

Respondent.

LIBEL IN PERSONAM

To the Honorable Judges of the United States District
Court Northern District of California, Southern
Division:

The libel of Weyerhaeuser Steamship Company, a
corporation, as owner of the F. E. WEYERHAEUS-
ER, a steamship of United States registry against the
United States of America, respondent in a cause of col-
lision, civil and maritime, alleges as follows:

I.

That at all pertinent times, libelant was and still is a
corporation duly organized and existing under and by
virtue of the laws of the State of Delaware, having
an office and place of business in San Francisco, Cali-
fornia.

II.

That at all pertinent times, the respondent, the United
States of America was and still is a sovereign which
has by law consented to be sued herein.

III.

That at all pertinent times the libelant was the owner and operator of the steaniship, F. E. WEYERHAEUSER, an inspected liberty type cargo vessel of United States Registry Official No. 245564, gross tonnage, 7218.

IV.

Upon information and belief that at all pertinent times, the respondent, United States of America, was and still is the owner and operator of the Dredge PACIFIC, an inspected hopper type dredge, not documented, built in 1937 of steel, 837 gross tons.

V.

This is a suit brought under the Act of March 3, 1925 known as the Public Vessel Act, 46 U. S. C. A. Section 781-790. The libelant hereby elects to have his cause proceed in accordance with the principles of libels in rem and desires also to seek relief in personam.

VI.

Upon information and belief that the Dredge PACIFIC at all times hereinafter mentioned was and now is operated as a public vessel of the United States and now is or during the pendency of this action will be within the navigable waters in the jurisdiction of this court.

VII.

Upon information and belief that heretofore, to wit, at about the hour of 1730 on the 8th day of September, 1955, respondent, Dredge PACIFIC ran into and collided with libelant's F. E. WEYERHAEUSER.

Said collision occurred just outside and slightly south of the mouth of Coos Bay at the approximate position of Latitude $43^{\circ}21'N$ and Longitude $124^{\circ}24'W$, Pacific International Waters. At the time of the collision the weather was very foggy, visibility poor, with a smooth sea and variable breezes. The F. E. WEYERHAEUSER was equipped with radar, direction finder, gyro compass with five repeaters, a steam whistle, all other equipment required to render her seaworthy and all said equipment was in good repair and operating condition.

VIII.

Upon information and belief that at the time of said collision the F. E. WEYERHAEUSER was bound from Coos Bay to Los Angeles carrying a cargo of lumber. At approximately 1707 on the 8th day of September, 1955 the F. E. WEYERHAEUSER disembarked its pilot and rounded the sea buoy (BW "K") at a course of 226° True than changed its course at 1717 to 215° True which course was continued until the collision at approximately 1730. That at or about 1712 the crew of the F. E. WEYERHAEUSER picked up by radar a target which later was ascertained to be the Dredge PACIFIC. The said Dredge PACIFIC was approximately dead ahead when first sighted and approximately 11° to the starboard of the F. E. WEYERHAEUSER's bow after the course change to 215° at 1717. The distance was between two and three miles. Between 1717 and the time of the collision, 1730, the F. E. WEYERHAEUSER maintained a constant course of 215° , while the Dredge PACIFIC was groping about and changed its course several times to

its starboard in an attempt to cut across the bow of the F. E. WEYERHAEUSER on a wholly unpredictable course and finally collided with the F. E. WEYERHAEUSER at approximately a 45° angle in contacting the F. E. WEYERHAEUSER abreast the No. 4 hold on the starboard side. By negligently handling and mismanaging the Dredge PACIFIC at excessive speeds the crew of said Dredge PACIFIC caused it to collide with the F. E. WEYERHAEUSER thereby damaging the F. E. WEYERHAEUSER; that the aforesaid damage was caused wholly by and do solely to the fault and negligence on the part of those in charge of the Dredge PACIFIC, in the following particulars, among others, which will be brought out upon trial:

(1) That the captain and crew of the Dredge PACIFIC handled the Dredge PACIFIC negligently and carelessly in attempting to turn a clear starboard to starboard passing situation into a crossing situation;

(2) That the Dredge PACIFIC was moving at excessive speed under the circumstances and weather conditions;

(3) That the captain and crew of the Dredge PACIFIC failed to use good seamanship;

(4) That the captain and crew of the Dredge PACIFIC were groping about on an unpredictable course and negligently attempted to cut across the bow of the F. E. WEYERHAEUSER;

(5) That the captain and crew of the Dredge PACIFIC failed to take steps to avoid collision between the Dredge PACIFIC and the F. E. WEYERHAEUSER.

IX.

That as a result of the negligence and carelessness of the respondent, as hereinabove set forth, libelant has been and now is damaged in the amount of \$58,403.95, no part of which sum has been paid, although payment thereof has been duly demanded.

X

That all and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

Wherefore, libelant prays that the respondent, United States of America, be required to appear and answer all and singular the matters aforesaid, and that the libelant may have a decree for the amount of its damages with interest and costs and that the libelant may have such other and further relief as may be just.

/s/ GRAHAM, JAMES & ROLPH

/s/ HENRY R. ROLPH

Proctors for Libelant

[Endorsed]: Filed July 18, 1956.

[Title of District Court and Cause.]

**INTERROGATORIES PROPOUNDED TO THE
RESPONDENT, WHICH HE IS REQUIRED
TO ANSWER IN WRITING**

Comes now libelant, Weyerhaeuser Steamship Company, propounds the following interrogatories which it requires respondent, the United States of America, to answer in writing, as provided in Rule 31 of the Admiralty Rules of Practice for the Courts of the United States:

1. Please state the names and addresses of all persons on the bridge of the Dredge PACIFIC between 1700 and the time of collision of the Dredge PACIFIC with the F. E. WEYERHAEUSER at approximately 1730 hours on September 8, 1955.

2. Please state the names and addresses of any or all persons who served as lookout on the Dredge PACIFIC between 1700 and the time of the collision of the Dredge PACIFIC with the F. E. WEYERHAEUSER at approximately 1730 hours on September 8, 1955.

3. Is the respondent informed of the course, course changes, speed and speed changes of the Dredge PACIFIC between 1700 and 1730 hours September 8, 1955?

4. If the answer to the third interrogatory herein is in the affirmative, please state what you are informed were the course, course changes, speed and speed changes of the Dredge PACIFIC between 1700 and 1730 hours September 8, 1955.

5. State the source of the information supplied in answer to the fourth interrogatory and give the names and addresses of all persons supplying such information.

6. Was the Dredge PACIFIC equipped with a course recorder at the time of the collision?

7. Was the course recorder in operation during the thirty minutes prior to the collision?

8. If the answer to the seventh interrogatory is in the affirmative, please state whether or not you will produce the course recorder chart in question for inspection and copying without requiring a court order to produce same.

9. Please state whether you will produce the deck log and bell book of the Dredge PACIFIC for September 8, 1955 for inspection and copying without a court order.


10. If your answers to interrogatories 8 and 9 are in the affirmative, state where and when such will be produced.

11. Was the Dredge PACIFIC equipped with a gyro compass at the time of said collision?

12. Was the gyro compass in operation during the thirty minutes prior to the collision?

13. Was the Dredge PACIFIC equipped with radar at the time of said collision?

14. If the answer to interrogatory 13 is in the affirmative, state the type, model and year of the radar equipment on the Dredge PACIFIC.



15. Was the radar in operation during the thirty minutes prior to the collision?

16. If the answer to the 15th interrogatory is in the affirmative, give the names and addresses of the persons in charge of and observing the radar of the Dredge PACIFIC during the thirty minutes preceding the collision.

17. If the answer to the 15th interrogatory is in the affirmative, is the respondent informed as to the time when the F. E. WEYERHAEUSER was first detected on the radar of the Dredge PACIFIC?

18. If the answer to the 17th interrogatory herein is in the affirmative, please state what time your information indicates that the F. E. WEYERHAEUSER was first detected on the radar of the Dredge PACIFIC, if detected.

19. Is the respondent informed as to the bearing of the F. E. WEYERHAEUSER at the time the Dredge PACIFIC first detected it on radar?

20. If the answer to the 19th interrogatory is in the affirmative, according to your information, please state the bearing of the F. E. WEYERHAEUSER at the time it was first detected by the radar of the Dredge PACIFIC.

21. If the Dredge PACIFIC was equipped with radar and said equipment was operating, is the respondent informed of the approximate distance from the Dredge PACIFIC of the F. E. WEYERHAEUSER at the time it was first detected by the Dredge PACIFIC radar.

22. If the answer to the 21st interrogatory herein is in the affirmative, please state what you are informed was the distance from the Dredge PACIFIC to the F. E. WEYERHAEUSER at the time it was first detected by the Dredge PACIFIC radar.

23. Is the respondent informed of the signals or other communication exchanged by the Dredge PACIFIC and the F. E. WEYERHAEUSER from the time the Dredge PACIFIC detected the F. E. WEYERHAEUSER on radar until the time of the collision?

24. Is respondent informed whether any change or changes were observed by the crew of the Dredge PACIFIC in the course or speed of the F. E. WEYERHAEUSER between the time she was first detected on radar, if detected, until the time of the collision?

25. If the answer to the 24th interrogatory is in the affirmative, please state what you are informed were the changes observed in the course or speed of the F. E. WEYERHAEUSER between the time she was first detected on radar, if detected, until the time of the collision.

26. If the answer to the 23rd interrogatory is in the affirmative, please state what you are informed were the signals and communications which were exchanged between the Dredge PACIFIC and the F. E. WEYERHAEUSER from the time the F. E. WEYERHAEUSER was first detected by Dredge PACIFIC radar and the time of the collision.

27. Under the conditions prevailing at the time of the collision, what revolutions were being made by the engines of the Dredge PACIFIC (a) in response to

the signal for full speed ahead; (b) in response to half speed ahead; (c) in response to a signal for slow speed ahead?

28. What was the pitch of the propeller of the Dredge PACIFIC?

29. What, if any, error was there on the compass of the Dredge PACIFIC?

30. Is respondent informed of the reports received from the lookout on the Dredge PACIFIC on sighting the F. E. WEYERHAEUSER and on hearing the whistle signal sounded by it, if any, and how were said reports, if any, transmitted to the wheel house?

31. If the answer to the 30th interrogatory is in the affirmative, please state what you are informed were the reports received from the lookout on the Dredge PACIFIC on the sighting of the F. E. WEYERHAEUSER and on hearing the whistle signal sounded by it and as to how said reports, if any, were transmitted to the wheel house.

32. Is the respondent informed as to the distance required to bring the Dredge PACIFIC to a full stop when proceeding at the speed that it was proceeding at the time of the collision?

33. If the answer to the 32nd interrogatory is in the affirmative, what distance are you informed is required to bring the Dredge PACIFIC to a full stop when proceeding at the speed that it was proceeding at the time of the collision.

34. State with particularity the hours during which each of the persons referred to in interrogatories number 1 and number 2 performed duties during the 24 hours next preceding the collision.

35. Describe the weather conditions existing at the time of the impact of the Dredge PACIFIC with the F. E. WEYERHAEUSER: (a) wind, (b) sea, (c) visibility, (d) precipitation.

/s/ GRAHAM, JAMES & ROLPH

/s/ HENRY R. ROLPH,
Proctors for Libelant.

[Title of District Court and Cause.]

ANSWER

Comes Now respondent United States of America and for answer to the libel of the Weyerhaeuser Steamship Company as owner of the SS F. E. WEYERHAEUSER in a cause of collision, civil and maritime, admits, denies and alleges as follows:

I.

Answering unto Article I, respondent admits the allegations thereof.

II.

Answering unto Article II, respondent admits that it was and still is a sovereign nation; respondent alleges that the remaining allegations of said Article present questions of law for the determination of the court and require no answer.

III.

Answering unto Article III, respondent admits the allegations thereof.

IV.

Answering unto Article IV, respondent admits the allegations thereof.

V.

Answering unto Article V, respondent alleges that the allegations thereof are matters for the attention of the court and require no answer.

VI.

Answering unto Article VI, respondent admits the allegations thereof.

VII.

Answering unto Article VII, respondent admits that at about the hour of 1730 on the 8th day of September, 1955 a collision occurred between the Dredge PACIFIC and the SS F. E. WEYERHAEUSER, that at the time of the collision the weather was foggy, visibility poor, with a smooth sea and variable breezes, and that the F. E. WEYERHAEUSER was equipped with radar, direction finder, Gyro compass with five repeaters and steam whistle; respondent denies each and every, all and singular, the remaining allegations of said Article not herein otherwise admitted or denied.

VIII.

Answering unto Article VIII, respondent admits that at the time of said collision the F. E. WEYERHAEUSER was bound from Coos Bay to Los Angeles carrying a cargo of lumber and that at approximately 1730 on the 8th day of September, 1955, a collision occurred between the Dredge PACIFIC and the said F. E. WEYERHAEUSER. Respondent denies each and every, all and singular, the allegations of said Article not herein otherwise admitted or denied.

IX.

Answering unto Article IX of the Libel, respondent denies that respondent or the Dredge PACIFIC or its

Master or any of the members of its crew were in any respect or at all negligent as in said Libel alleged or at all negligent and denies that libelant has been damaged in the amount of \$58,403.95 or in any other amount or at all. Respondent admits that libelant has demanded from Respondent the sum of \$58,403.95 and that respondent has paid no part thereof. Respondent denies each and every allegation in said Article IX not herein otherwise admitted or denied.

X.

Answering unto Article X, respondent admits the admiralty and maritime jurisdiction of the United States and of this Honorable Court but denies each and every, all and singular, the allegations of said Article not herein otherwise admitted or denied.

Wherefore respondent United States of America prays that the libel be dismissed with costs, and that it recover the damages prayed for in its cross-libel filed herewith.

LLOYD H. BURKE

United States Attorney

/s/ KEITH R. FERGUSON,

Special Assistant to the
Attorney General

/s/ JOHN F. MEADOWS

Attorney, Department of Justice
Proctors for United States
of America.

Duly Verified.

Addidavit of Service by Mail Attached.

[Endorsed]: Filed July 3, 1957.

In the United States District Court
for the Northern District of California,
Southern Division

In Admiralty

No. 27359

WEYERHAEUSER STEAMSHIP COMPANY, a
corporation,

Libelant,

vs.

UNITED STATES OF AMERICA,

Respondent.

UNITED STATES OF AMERICA,

Cross-Libelant,

vs.

The American Steamship F. E. WEYERHAEUSER,
her engines, boilers, tackle, apparel and furniture,
etc., and WEYERHAEUSER STEAMSHIP
COMPANY, a corporation,

Cross-Respondent.

CROSS-LIBEL FOR COLLISION

To the Honorable, the Judges of the Southern Division
of the United States District Court for the North-
ern District of California:

The cross-libel of the United States of America, a
sovereign nation, as owner of the Army Corps of En-
gineers Dredge PACIFIC, against the American
Steamship F. E. WEYERHAEUSER, her engines,
boilers, tackle, apparel and furniture, etc., in rem, and

Weyerhaeuser Steamship Company, a corporation, in personam, in a cause of collision, civil and maritime, on information and belief alleges as follows:

I.

That cross-libelant is now and was during all the times herein mentioned, a sovereign nation, and the sole owner of the United States Army Corps of Engineers Dredge PACIFIC, an inspected, hopper-type dredge, not documented, of 837 gross tons, which was prior to and at the time of the collision hereinafter described tight, staunch and strong and in all respects seaworthy and properly manned, officered, equipped and supplied.

II.

That cross-respondent Weyerhaeuser Steamship Company is now and was during all the times herein mentioned a corporation duly organized and existing under and by virtue of the laws of the State of Delaware, having an office and place of business in the City and County of San Francisco, State of California, and is now and was during all the times herein mentioned the owner and operator of the American Steamship F. E. WEYERHAEUSER, Official Number 245564, a steel Liberty type cargo vessel of 7,218 gross tons, and the employer, at the time of the collision hereinafter mentioned, of the officers and crew of said vessel.

III.

That on or about July 18, 1956, said cross-respondent filed the original libel herein; that the said cross-respondent is within this district and within the jurisdiction of this Honorable Court; that the said Steam-

ship F. E. WEYERHAEUSER is now or, during the pendency of this action, will be within the navigable waters in the jurisdiction of this Honorable Court.

IV.

On September 8, 1955, at about the hour of 5:30 P.M. a collision occurred between the said Dredge PACIFIC and the F. E. WEYERHAEUSER off the coast of the State of Oregon near the entrance to the harbor at Coos Bay. The PACIFIC was enroute to Coos Bay, Oregon, from Bandon, Oregon, and the F. E. WEYERHAEUSER was enroute to Los Angeles, California, from Coos Bay. Visibility was restricted by fog and the PACIFIC, proceeding at reduced speed and with due regard for existing conditions, was sounding proper signals and maintaining a proper watch in the engine room and on deck, including a lookout on the forecastle head. The radar aboard the PACIFIC was in operation and properly guarded. While the PACIFIC was thus proceeding, the F. E. WEYERHAEUSER, travelling at excessively high speed in the fog, suddenly cut directly across the port bow of the PACIFIC, causing her starboard side to come into collision with the stem of the PACIFIC. At the time of this collision, the headway of the PACIFIC was practically stopped. The F. E. WEYERHAEUSER thereafter continued on and failed to stop. Though the Master of the F. E. WEYERHAEUSER well knew that his vessel had been in collision, he failed, all without reasonable cause and in

violation of 33 United States Code, Section 367, to stay by the PACIFIC and to offer or render or attempt to render any assistance that may have been practicable or necessary to save the Master and crew of the PACIFIC from any danger caused by the collision and also failed, until traced and located by the PACIFIC, to give to the Master of the PACIFIC the name of his own vessel and her port of registry and the ports from which and to which she was bound.

V.

That prior to and at the time of the said collision, the PACIFIC was properly manned and operated and in all respects observing and complying with the rules and laws governing a vessel in her situation. Said collision was in no way due to any act or fault on the part of cross-libelant, nor of the PACIFIC, nor of those in charge of her, but was due solely to the careless, reckless, and negligent navigation and operation of the F. E. WEYERHAEUSER in the following, among other, respects:

1. She failed to have on watch proper lookouts attentive to their duties and properly stationed;

2. Being in a fog and hearing the fog signals of the PACIFIC apparently forward of her beam, the position of the PACIFIC not then being ascertained, the F. E. WEYERHAEUSER did not, although the circumstances of the case required it, stop her engines

and then navigate with caution until the danger of collision should have passed;

3. She failed to use her radar and other navigational aids properly so as to avoid collision;

4. She operated prior to and at the time of the collision at excessive and immoderate speed under the circumstances and conditions existing at the time;

5. She failed to change her course to avoid collision as provided by the applicable rules and law;

6. She failed to stop her engines and reverse in time to avoid the collision;

7. She was unseaworthy both as to hull and equipment;

8. She failed to blow the whistles and signals required by the Rules of the Road;

9. She was at the time of the collision and immediately prior thereto, contrary to established custom and usage, navigating in an improper area for vessels outbound and southbound from Coos Bay, Oregon.

10. She did not have on watch proper and competent officers, engineers and helmsmen, nor were they attentive to their duties, but on the contrary said officers, engineers and helmsmen were incompetent and inattentive and failed to give, receive, and execute proper orders;

11. Said SS F. E. WEYERHAEUSER and her owners, operators, master and members of her crew

were at fault in other particulars of which cross-libelant is not at present fully advised and begs leave when so advised to offer proof of such negligent acts and to amend this libel to conform to said facts.

VI.

That as a direct and proximate result of said collision and the neglect and fault of cross-respondent and the SS F. E. WEYERHAEUSER as aforesaid, cross-libelant has sustained damage in the sum of \$19,218.58, as nearly as now can be estimated, no part of which has been paid although duly demanded.

VII.

That all and singular the premises are true and within the Admiralty and Maritime jurisdiction of the United States and of this Honorable Court.

Wherefore, cross-libelant prays:

1. That process in due form of law according to the practice of this Honorable Court in causes of admiralty and maritime jurisdiction may issue against the American Steamship F. E. WEYERHAEUSER, her engines, boilers, tackle, apparel and furniture, etc., and that all persons claiming any interest therein may be required to appear and answer on both all and singular the matters aforesaid;

2. That cross-libelant may have a decree for its damages with interest and costs and that said American Steamship F. E. WEYERHAEUSER may be con-

demned and sold to satisfy the damages of the cross-libelant herein;

3. That process in due form of law according to the practice of this Honorable Court may issue under this cross-libel against cross-respondent Weyerhaeuser Steamship Company citing it to appear and answer on oath the allegations of this cross-libel, and that in default of such appearance and answer the proceedings under its original libel above-described be stayed;

4. That this Honorable Court may adjudge and decree that the cross-respondent Weyerhaeuser Steamship Company pay to the cross-libelant its damages as aforesaid with interest and costs;

5. That cross-libelant may have such other and further relief in the premises as in law and justice it may be entitled to receive.

LLOYD H. BURKE

United States Attorney

/s/ KEITH R. FERGUSON

Special Assistant to the
Attorney General

/s/ JOHN F. MEADOWS

Attorney, Department of Justice
Proctors for United States
of America.

Duly Verified.

[Endorsed]: Filed July 3, 1957.

In the United States District Court, for the Northern
District of California, Southern Division

In Admiralty

No. 27359

WEYERHAEUSER STEAMSHIP COMPANY, a
corporation,

Libelant,

vs.

UNITED STATES OF AMERICA,

Respondent.

ST. PAUL FIRE & MARINE INSURANCE CO.,
a corporation, and FIREMAN'S FUND INSUR-
ANCE CO., a corporation,

Intervening Libelants.

LIBEL IN INTERVENTION OF ST. PAUL FIRE
& MARINE INSURANCE CO., A CORPORA-
TION, AND FIREMAN'S FUND INSUR-
ANCE CO., A CORPORATION.

To the Honorable, the Judges of the above-entitled
Court:

The libel in intervention of St. Paul Fire & Marine
Insurance Co., a corporation, and Fireman's Fund In-
surance Co., a corporation, in a cause civil and maritime
against the United States of America arising out of the
matters and things alleged in the original libel in the
above captioned cause, respectfully alleges as follows:

I.

Intervenor St. Paul Fire & Marine Insurance Co. is
and was at all relevant times a corporation organized

and existing under the laws of the State of Minnesota and transacting business as a marine insurer.

Intervenor Fireman's Fund Insurance Co. is and was at all relevant times a corporation organized and existing under the laws of the State of California and transacting business as a marine insurer.

II.

Respondent the United States of America is and was at all relevant times a sovereign which has by law consented to be sued herein.

III.

Upon information and belief, respondent is and was at all relevant times the owner and operator of the self-powered Dredge PACIFIC, an inspected hopper-type dredge, not documented, 837 gross tons.

IV.

Upon information and belief, said dredge PACIFIC is and was at all relevant times operated as a public vessel of the United States and was within the navigable waters of the Northern District of California during the pendency of process herein.

V.

Intervenors file this libel under the provisions of the Public Vessels Act, 46 U. S. Code, sections 781-90, and elect to proceed in accordance with the principles of in rem as well as in personam liability.

VI.

At or about 1730 hours on September 8, 1955, the dredge PACIFIC was in collision with the American Steamer F. E. WEYERHAEUSER, official No. 245,-

564, in the waters of the Pacific Ocean just off the mouth of Coos Bay, Oregon. Upon information and belief, the weather was foggy at time of collision, with poor visibility, a smooth sea and variable breezes. Upon information and belief, said collision was directly and proximately caused by the negligent navigation of the Dredge PACIFIC in the following respects:

1. Although the PACIFIC and the WEYERHAEUSER approached, in position to meet and pass starboard to starboard, the PACIFIC failed to do so, and instead turned to her right across the path of the WEYERHAEUSER and struck the latter on the starboard side.

2. The PACIFIC negligently failed to maintain a constant course of any sort, but changed course several times so erratically that the WEYERHAEUSER, even with the use of radar, was unable to forecast or anticipate the movements of the PACIFIC or to take any effective measures to avoid being struck.

3. The PACIFIC was operated at a dangerous and excessive rate of speed under the conditions of fog and impaired visibility then prevailing.

4. The PACIFIC failed to maintain a proper or competent lookout.

5. The master and crew of the PACIFIC failed to take proper or any steps to avoid collision after becoming aware of the presence of the WEYERHAEUSER.

6. The PACIFIC was improperly and carelessly navigated and maintained in other respects, of which intervenors are now presently informed; intervenors pray leave to amend this libel in intervention by setting forth such additional faults when the same become known.

VII.

At the time of said collision the WEYERHAEUSER had a cargo of lumber on board (loaded at Olympia, Raymond, Long View and Coos Bay) and was under way for Baltimore, Brooklyn and Port Newark on the East Coast of the United States. As a result of the collision the WEYERHAEUSER was so badly damaged that she was reasonably compelled to, and did, put into a port of refuge, Portland, Oregon, where general average expenses were reasonably and necessarily incurred in off-loading part of her cargo, making temporary repairs, and re-loading.

VIII.

Thereafter, in accordance with maritime law and practice, the owner of the WEYERHAEUSER caused a general average to be declared, adjusted and stated, and as a final result of the general average statement the cargo of lumber on board the WEYERHAEUSER at the time of collision was found and stated to be indebted to the shipowner in the total sum of \$20,490.14 as and for its general average obligation arising out of said collision.

IX.

Prior to the start of the voyage on which the WEYERHAEUSER was engaged at the time of the collision, intervenor Fireman's Fund Insurance Co. had issued its policy of marine insurance covering a shipment of 68,640 pieces of lumber shipped by Twin Harbor Lumber Co. at Raymond and consigned to the order of the shipper at Brooklyn, which said shipment was aboard the WEYERHAEUSER at the time of the collision.

In and by the aforesaid general average statement said shipment of lumber was legally obligated for a general average contribution of \$923.85. By virtue of the terms and conditions of its said marine insurance policy, intervenor Fireman's Fund Insurance Co. was obligated to, and did hereofore, pay the said amount to the owner of the WEYERHAEUSER on behalf of said shipment, in satisfaction of such general average liability. Said intervenor thereby and thereupon succeeded and became subrogated to the rights of the shipper, consignee and owner of said shipment against respondent herein.

X.

Prior to the start of the voyage on which the WEYERHAEUSER was engaged at the time of the collision, intervenor St. Paul Fire & Marine Insurance Co. had issued its policies of marine insurance covering all other shipments then on board the WEYERHAEUSER except for four minor interests. In and by the aforesaid general average statement, the shipments so insured by said intervenor were legally obligated for general average contributions totaling \$19,122.75.

By virtue of the terms and conditions of its said marine insurance policies, intervenor St. Paul Fire & Marine Insurance Co. was obligated to, and did heretofore, pay the said amount to the owner of the WEYERHAEUSER on behalf of the shipments so insured, in satisfaction of said general average liability. Said intervenor thereby and thereupon succeeded and became subrogated to the rights of the shippers, consignees and owners of said shipments against respondent herein.

XI.

By reason of the negligent operation of the PACIFIC, intervening libelants have been damaged in the sums of \$19,122.75 for St. Paul Fire & Marine Insurance Co. and \$923.85 for Fireman's Fund Insurance Co., as above set forth in detail.

XII.

All and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

Wherefore intervening libelants pray that they be permitted to file this, their libel in intervention, in the above entitled cause; that respondent be required to appear and answer all and singular the matters aforesaid; that intervening libelants have and recover from respondent their damages, together with interest and costs; and that intervening libelants have all such other and further relief as may be just and proper in the premises.

Dated: July 30, 1957.

/s/ STANLEY J. COOK

DERBY, COOK, QUINBY & TWEEDT

Proctors for Intervening Libelants

Duly Verified.

[Endorsed]: Filed July 30, 1957.

Weyerhaeuser Steamship Company, et al. 29

In the United States District Court for the Northern
District of California, Southern Division

In Admiralty

No. 27359

WEYERHAEUSER STEAMSHIP COMPANY,
corporation,

Libelant,

vs.

UNITED STATES OF AMERICA,

Respondent.

UNITED STATES OF AMERICA,

Cross Libelant,

vs.

The American Steamship F. E. WEYERHAEUSER,
etc., and WEYERHAEUSER STEAMSHIP
COMPANY, a corporation,

Cross Respondent.

ST. PAUL FIRE & MARINE INSURANCE CO.,
a corporation, and FIREMAN'S FUND INSUR-
ANCE CO., a corporation,

Intervening Libelants.

ANSWER TO LIBEL IN INTERVENTION

Comes Now respondent United States of America
and for answer to the libel in intervention of St. Paul
Fire & Marine Insurance Co., and Fireman's Fund In-

Insurance Co., in a cause civil and maritime against the United States of America, admits, denies and alleges as follows:

I.

Answering unto Article I, respondent admits the allegations thereof.

II.

Answering unto Article II, respondent admits that it was and still is a sovereign nation; respondent alleges that the remaining allegations of said article present questions of law for the determination of the Court and require no answer.

III.

Answering unto Article III, respondent admits the allegations thereof.

IV.

Answering unto Article IV, respondent admits the allegations thereof.

V.

Answering unto Article V, respondent alleges that the allegations thereof present matters for the attention of the court and require no answer.

VI.

Answering unto Article VI, respondent alleges that at about the hour of 1730 on September 8, 1955, a collision occurred between the Dredge PACIFIC and the American Steamer F. E. WEYERHAEUSER, of-

ficial No. 245,564 in the waters of the Pacific Ocean; that at the time of the collision the weather was foggy, visibility poor, the sea smooth, and variable breezes blowing; respondent denies each and every, all and singular, the remaining allegations of said article not herein otherwise admitted or denied.

Further answering unto said Article VI respondent alleges that said collision was in no way due to any act or fault on the part of United States, nor of the PACIFIC, nor of those in charge of her, but was due solely to the careless, reckless, and negligent navigation and operation of the F. E. WEYERHAEUSER in the following, among other, respects:

1. She failed to have on watch proper lookouts attentive to their duties and properly stationed;

2. Being in a fog and hearing the fog signals of the PACIFIC apparently forward of her beam, the position of the PACIFIC not then being ascertained, the F. E. WEYERHAEUSER did not, although the circumstances of the case required it, stop her engines and then navigate with caution until the danger of collision should have passed;

3. She failed to use her radar and other navigational aids properly so as to avoid collision;

4. She operated prior to and at the time of the collision at excessive and immoderate speed under the circumstances and conditions existing at the time;

5. She failed to change her course to avoid collision as provided by the applicable rules and law;

6. She failed to stop her engine and reverse in time to avoid the collision;

7. She was unseaworthy both as to hull and equipment;

8. She failed to blow the whistles and signals required by the Rules of the Road;

9. She was at the time of the collision and immediately prior thereto, contrary to established custom and usage, navigating in an improper area for vessels outbound and southbound from Coos Bay, Oregon.

10. She did not have on watch proper and competent officers, engineers and helmsmen, nor were they attentive to their duties, but on the contrary said officers, engineers and helmsmen were incompetent and inattentive and failed to give, receive, and execute proper orders:

11. Said SS F. E. WEYERHAEUSER and her owners, operators, master and members of her crew were at fault in other particulars of which United States is not at present fully advised and begs leave when so advised to offer proof of such negligent acts and to amend this answer to conform to said facts.

VII.

Answering unto Article VII, respondent alleges that it has no information or belief sufficient to answer the

allegations of said Article VII and upon that ground denies each and every, all and singular the allegations thereof.

VIII.

Answering unto Article VIII, respondent alleges that it has no information or belief sufficient to answer the allegations of said Article VIII and upon that ground denies each and every, all and singular the allegations thereof.

IX.

Answering unto Article IX, respondent alleges that it has no information or belief sufficient to answer the allegations of said Article IX and upon that ground denies each and every, all and singular the allegations thereof.

X.

Answering unto Article X, respondent alleges that it has no information or belief sufficient to answer the allegations of said Article X and upon that ground denies each and every, all and singular the allegations thereof.

XI.

Answering unto Article XI of the libel, respondent denies that respondent or the Dredge PACIFIC or its Master or any of the members of its crew were in any respect or at all negligent as in said libel in intervention alleged or at all negligent and denies that libellant in intervention St. Paul Fire & Marine Insurance Co.

has been damaged in the sum of \$19,122.75 or in any other sum or at all and denies that libelant in intervention Fireman's Fund Insurance Co. has been damaged in the sum of \$923.85 or in any other sum or at all. Respondent denies each and every allegation in said article not herein otherwise admitted or denied.

XII.

Answering unto Article XII, respondent admits the admiralty and maritime jurisdiction of the United States and of this Honorable Court but denies each and every, all and singular, the allegations of said article not herein otherwise admitted or denied.

Wherefore respondent United States of America prays that the libel in intervention be dismissed with costs.

LLOYD H. BURKE

United States Attorney

/s/ KEITH R. FERGUSON

Special Assistant to the

Attorney General

/s/ JOHN F. MEADOWS

Attorney, Department of Justice

Proctors for United States
of America.

Duly Verified.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed Oct. 29, 1957.

In the United States District Court for the Northern
District of California, Southern Division

In Admiralty

No. 27359

WEYERHAEUSER STEAMSHIP COMPANY, a
corporation

Libelant,

vs.

UNITED STATES OF AMERICA

Respondent.

UNITED STATES OF AMERICA

Cross Libelant,

vs.

The American Steamship F. E. WEYERHAEUSER,
her engines, boilers, tackle, apparel and furniture,
etc., and WEYERHAEUSER STEAMSHIP
COMPANY, a corporation

Cross Respondent.

ANSWER TO CROSS LIBEL FOR COLLISION

Comes now cross respondent Weyerhaeuser Steam-
ship Company, a corporation, and for answer to the
cross libel in rem and in personam of the United States
of America as owner of the Dredge PACIFIC in a
cause of collision, civil and maritime, admits, denies
and alleges as follows:

I.

Answering unto Article I, admits that cross libellant is a sovereign nation and sole owner and operator of the United States Army Corps of Engineers Dredge PACIFIC, an inspected hopper-type dredge, not documented, of 837 gross tons; denies each and every, all and singular, the remaining allegations of said article not herein otherwise admitted.

II.

Answering unto Article II, admits the allegations thereof.

III.

Answering unto Article III, admits the allegations thereof.

IV.

Answering unto Article IV, admits that on September 8, 1955, at about the hour of 5:30 P.M., a collision occurred between the said Dredge PACIFIC and the F. E. WEYERHAEUSER off the coast of the State of Oregon, near the entrance to the harbor of Coos Bay; admits that the Dredge PACIFIC was enroute to Coos Bay, Oregon, from Bandon, Oregon, and the F. E. WEYERHAEUSER was enroute to Los Angeles, California, from Coos Bay; denies each and every, all and singular, the remaining allegations of said article not herein otherwise admitted or denied.

V.

Answering unto Article V, denies each and every, all and singular, the allegations contained therein.

VI.

Answering unto Article VI, denies that as a direct and proximate result of said collision and neglect and fault of the cross respondent and/or the SS F. E. WEYERHAEUSER, cross libelant has sustained damages in the sum of \$19,218.58, or in any other amount or at all; admits that demand for payment has been made and that no part of the payment demanded has been paid.

VII.

Answering unto Article VII, denies each and every, all and singular, the allegations contained therein.

Wherefore cross respondent Weyerhaeuser Steamship Company prays that the cross libel be dismissed with costs, and that it recover the damages prayed for in its libel filed heretofore.

/s/ GRAHAM, JAMES and ROLPH

/s/ DAN J. HENDERSON

Proctors for Libelant and
Cross Respondent Weyerhaeuser
Steamship Company.

Duly Verified.

[Endorsed]: Filed Oct. 30, 1957.

In the United States District Court for the Northern
District of California, Southern Division

In Admiralty

No. 27359

WEYERHAEUSER STEAMSHIP COMPANY, a
corporation,

Libelant,

vs.

UNITED STATES OF AMERICA.

Respondent.

UNITED STATES OF AMERICA.

Cross-Libelant,

vs.

The American Steamship F. E. WEYERHAEUSER,
etc., and WEYERHAEUSER STEAMSHIP
COMPANY, a corporation,

Cross-Respondent.

ST. PAUL FIRE & MARINE INSURANCE CO., a
corporation, and FIREMAN'S FUND INSUR-
ANCE CO., a corporation,

Intervening Libelants.

CONSENT TO AMENDMENT OF LIBEL.

While recognizing that the law in any event would
permit libelant to amend its libel herein by adding to
the amount of damages prayed for any sums recovered

from it on account of personal injury in that certain action entitled *Ostrom v. Weyerhaeuser Steamship Co.* No. 4255 in the United States District Court for the Western District of Washington, or to prove such damages without amendment, respondent United States, nevertheless hereby formally consents that such amendment be made and that the amount of the damages prayed for in the libel be henceforth deemed so amended.

LLOYD H. BURKE

United States Attorney

/s/ KEITH R. FERGUSON

Special Assistant to the
Attorney General

/s/ JOHN F. MEADOWS

Attorney, Admiralty and
Shipping Section Department
of Justice

Proctors for United States
of America.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed April 22, 1958.

[Title of District Court and Cause.]

ANCILLARY PETITION FOR INJUNCTION
AND TEMPORARY RESTRAINING ORDER

To the Honorable, the Judges of the United States
District Court for the Northern District of California
Sitting in Admiralty:

The Ancillary Petition of respondent and cross-libelant United States of America for Injunction and Temporary Restraining Order in aid of jurisdiction herein under Title 28 U.S.C., Section 1651 respectfully shows:

I.

On September 8, 1955 a collision occurred between the Dredge PACIFIC, a public vessel of the United States and the SS F. E. WEYERHAEUSER, owned and operated by libelant Weyerhaeuser Steamship Company which resulted in substantial damage to both vessels and the declaration of a General Average requiring contribution from the owners of cargo aboard the SS F. E. WEYERHAEUSER.

II.

On July 18, 1956 libelant filed its libel herein in rem and in personam principles seeking to recover its collision damages from respondent United States under the Public Vessels Act. Such damages which would be recoverable should libelant prevail include not only damage to libelant's vessel but sums which libelant may be called upon to pay to third parties by reason of the said collision. Respondent United States has answered the libel and filed herein its cross-libel seeking its damages arising from the said collision. Libelant and cross-

respondent has answered the cross-libelant. A libel in intervention by underwriters of cargo aboard the SS F. E. WEYERHAEUSER has been filed and the case is fully at issue.

III.

The jurisdiction and venue of the subject matter of this action, to wit: the rights and liabilities of the parties hereto arising from the said collision are established exclusively in the United States District Court for the Northern District of California by reason of the action herein.

IV.

One Reynold E. Ostrom, a member of the crew of the Dredge PACIFIC at the time of the said collision, has filed against Weyerhaeuser Steamship Co. in the United States District Court for the Western District of Washington a certain action entitled Ostrom v. Weyerhaeuser Steamship Co., Civil No. 4255 in which he seeks by action, of the law to recover damages from Weyerhaeuser Steamship Co. for injuries which he claims to have suffered by reason of the said collision.

V.

The libelant herein has moved in the said action in the Western District of Washington for leave to file a third-party complaint against respondent United States claiming that the United States is at fault and liable for damages suffered as a result of the said collision. On April 21, 1958, the United States District Court for the Western District of Washington granted the said motion to implead, notwithstanding objections by the United States that this Court has exclusive jurisdiction herein and that the United States District

Court for the Western District of Washington has neither jurisdiction nor venue of such third-party complaint. A motion for reconsideration of the said order allowing impleader has been made and is now pending.

VI.

The Dredge PACIFIC on April 21, 1958 and prior thereto was, and until about May 24, 1958 at the very least, will be located at Portland, Oregon, within the District of Oregon.

VII.

Trial of the case of Ostrom vs. Weyerhaeuser Steamship Co. in the United States District Court of the Western District of Washington is presently set for May 20, 1958, and the Court in the said case in granting the said motion to implead the United States has ordered that such impleader will not be permitted to result in a continuance.

VIII.

Libelant's proposed third-party suit against the United States in the Western District of Washington is a vexatious suit and a contumacious encroachment upon the exclusive jurisdiction of this Court.

IX.

The said third-party action is seriously prejudicial to the respondent United States herein in that it seeks to split the cause of action and impose upon respondent the burden of trying this collision case twice, of going to trial the first time upon approximately 30 days' notice without even the time allowed for pleading and discovery, of going to trial at law rather than in admiralty in a district in which venue is not properly

laid, and of running the risk that a judgment obtained in such circumstances might be asserted as *res judicata* in the principal collision action pending herein. An immediate restraining order is required to prevent immediate and irreparable injury, loss or damage by the filing and service of the said third-party complaint, and by the issuance of various orders thereunder upon motion of the libelant, the filing and issuance of which might necessitate the participation of respondent in the trial of the said action in the Western District of Washington notwithstanding that libelant might subsequently be restrained by injunction herein.

X.

All and singular, the premises are true.

Wherefore, respondent and cross-libelant United States of America prays that the Court issue *ex parte* its temporary restraining order and order to show cause restraining libelant herein from instituting or prosecuting the said third-party action in the United States District Court for the Western District of Washington and ordering libelant to show cause upon due hearing why a preliminary injunction should not issue further restraining the institution or prosecution of the said action, and that the Court permanently enjoin the institution for prosecution of such third-party action.

LLOYD H. BURKE

United States Attorney

/s/ KEITH R. FERGUSON

Special Assistant to the

Attorney General

/s/ GRAYDON S. STARING

Attorney, Admiralty and
Shipping Section,
Department of Justice.

/s/ JOHN F. MEADOWS

Attorney, Admiralty and
Shipping Section,
Department of Justice
Proctors for United States
of America.

Duly Verified.

[Endorsed]: Filed April 22, 1958.

[Title of District Court and Cause.]

TEMPORARY RESTRAINING ORDER AND
ORDER TO SHOW CAUSE

Whereas in this cause it has been made to appear by the verified Ancillary Petition for Injunction and Temporary Restraining Order filed herein which was on this 22nd day of April, 1958 presented to the Honorable Louis E. Goodman, Judge of the United States District Court for the Northern District of California, that a restraining order preliminary to hearing upon the issuance of preliminary injunction should issue, without notice because immediate and irreparable injury, loss or damage will result to the respondent before notice can be served and a hearing had thereon, in that libellant may in the meantime file and serve a third-party complaint upon respondent in that certain action entitled

Ostrom vs. Weyerhaeuser Steamship Co., Civil No. 4255 in the United States District Court for the Western District of Washington and make such motions and secure such orders therein as to render ineffective the injunction prayed for herein by making it necessary for respondent herein, in order to protect its interests adequately, to appear and defend the said third-party complaint notwithstanding the exclusive jurisdiction of this Court, and whereas notice and a hearing before entering a temporary restraining order in the present circumstances should not be required inasmuch as the material facts are supported by the record herein, now therefore

It Is Ordered that libelant, its agents, successors, deputies, servants and employees and all persons acting by, come through or under them or any of them or by or through their order, be, and they are hereby, restrained until Monday, April 28, 1958, from filing, instituting, or prosecuting any third-party complaint, action or proceeding whatever against respondent United States of America in that certain action entitled Ostrom vs. Weyerhaeuser Steamship Co., Civil No. 4255, in the United States District Court for the Western District of Washington, and it is

Further Ordered that libelant by its proctors herein be and appear before this Court in the Master Calendar Department thereof Monday, April 28, 1958, then and there to show cause, if any there be, why a preliminary injunction should not be issued further restraining libelants as aforesaid pending the disposition of the present action herein, and it is

/s/ GRAYDON S. STARING

Attorney, Admiralty and
Shipping Section,
Department of Justice.

/s/ JOHN F. MEADOWS

Attorney, Admiralty and
Shipping Section,
Department of Justice
Proctors for United States
of America.

Duly Verified.

[Endorsed]: Filed April 22, 1958.

[Title of District Court and Cause.]

TEMPORARY RESTRAINING ORDER AND
ORDER TO SHOW CAUSE

Whereas in this cause it has been made to appear by the verified Ancillary Petition for Injunction and Temporary Restraining Order filed herein which was on this 22nd day of April, 1958 presented to the Honorable Louis E. Goodman, Judge of the United States District Court for the Northern District of California, that a restraining order preliminary to hearing upon the issuance of preliminary injunction should issue, without notice because immediate and irreparable injury, loss or damage will result to the respondent before notice can be served and a hearing had thereon, in that libelant may in the meantime file and serve a third-party complaint upon respondent in that certain action entitled

Ostrom vs. Weyerhaeuser Steamship Co., Civil No. 4255 in the United States District Court for the Western District of Washington and make such motions and secure such orders therein as to render ineffective the injunction prayed for herein by making it necessary for respondent herein, in order to protect its interests adequately, to appear and defend the said third-party complaint notwithstanding the exclusive jurisdiction of this Court, and whereas notice and a hearing before entering a temporary restraining order in the present circumstances should not be required inasmuch as the material facts are supported by the record herein, now therefore

It Is Ordered that libelant, its agents, successors, deputies, servants and employees and all persons acting by, come through or under them or any of them or by or through their order, be, and they are hereby, restrained until Monday, April 28, 1958, from filing, instituting, or prosecuting any third-party complaint, action or proceeding whatever against respondent United States of America in that certain action entitled Ostrom vs. Weyerhaeuser Steamship Co., Civil No. 4255, in the United States District Court for the Western District of Washington, and it is

Further Ordered that libelant by its proctors herein be and appear before this Court in the Master Calendar Department thereof Monday, April 28, 1958, then and there to show cause, if any there be, why a preliminary injunction should not be issued further restraining libelants as aforesaid pending the disposition of the present action herein, and it is

Further Ordered that service of this order be made upon libelant by serving the order upon libelant's proctors of record herein or any of them.

Issued at 4 o'clock P.M. this 22nd day of April, 1958.

/s/ LOUIS E. GOODMAN,

United States District Judge

[Endorsed]: Filed April 22, 1958.

[Title of District Court and Cause.]

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF ANCILLARY PETITION FOR INJUNCTION AND TEMPORARY RESTRAINING ORDER.

It is clear that libelant is attempting to file against respondent in another district a third-party complaint, the subject matter of which is the same as the subject matter of the present action, to wit: the liability of the parties hereto with respect to a certain collision of the Dredge PACIFIC and the SS F. E. WEYERHAEUSER. The material facts are set forth in the Ancillary Petition, itself.

Even in cases of concurrent jurisdiction, which is not the case here, the court which first takes jurisdiction acquires an exclusive jurisdiction to proceed to the decision of the case.

French v. Hay, 22 Wall. 250, 22 L. Ed. 857 (1875);

Ex parte, City Bank of New Orleans, 3 How. 292, 314 11 L. Ed. 603, 613 (1845);

Smith v. McIver, 9 Wheat. 532, 535 6 L. Ed. 152, 154 (1824);

The appropriate procedure in a case like the present one is for the court first acquiring jurisdiction, whether acting under 28 U.S.C. 1651 or its inherent powers, to enjoin the party before it from prosecuting an action on the same subject matter elsewhere.

Steelman v. Alf Continent Corp., 301 U. S. 278, 288 81 L. Ed. 1085, 1092 (1937);

Gage v. Riverside Trust Co., 86 Fed. 984, 999 (C. C. Cal. 1898);

Higgins v. California Prune & Apricot Growers, 282 Fed 550 (2d Cir. 1922);

Cresta Blanca Wine Co. v. Eastern Wine Corp., 143 F. 2d 1012 (2d Cir. 1944);

Crosley Corporation v. Westinghouse Electric & Manufacturing Co., 130 F. 2d 474 (3d Cir. 1942) Cert. denied, 317 U.S. 681;

Crosley Corporation v. Hazeltine Corporation, 122 F. 2d 925 (3d Cir. 1941) Cert. denied, 315 U.S. 813;

In re Georgia Power Co., 89 F. 2d 218 (5th Cir. 1937) Cert. denied, 302 U. S. 692;

Urbin v. Knapp Bros. Manufacturing Company, 217 F. 2d 810 (6th Cir. 1954);

Milwaukee Gas Specialty Co. v. Mercoid Corp., 104 F. 2d 589 (7th Cir. 1939);

Chicago Pneumatic Tool Co. v. Hughes Tool Co., 180 F. 2d 97 (10th Cir. 1950) Cert. denied 340 U. S. 816;

Food Fair Stores v. Square Deal Market Co., 187 F. 2d 219 (D. C. Cir. 1950);

Speed Products Co. v. Tinnerman Products, 171 F. 2d 727 (D. C. Cir. 1949);

See *The Christiansborg*, L. R. 10 Prob. 141, 152 (Court of Appeal 1885).

The filing of a second suit on the same subject matter in another jurisdiction in circumstances such as these is prima facie vexatious and the burden is upon the party so suing to show good cause for such suit.

Higgins v. California Prune & Apricot Growers, 282 Fed. 550 (2d Cir. 1922);

See *The Christiansborg*, L. R. 10 Prob. 141, 152 (Court of Appeal 1885).

LLOYD H. BURKE

United States Attorney

/s/ KEITH R. FERGUSON

Special Assistant to the
Attorney General

/s/ GRAYDON S. STARING

Attorney, Admiralty and
Shipping Section
Department of Justice

/s/ JOHN F. MEADOWS

Attorney, Admiralty and
Shipping Section
Department of Justice
Proctors for United States
of America.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed April 24, 1958.

[Title of District Court and Cause.]

ORDER FOR WRIT OF INJUNCTION

The libelant Weyerhaeuser Steamship Company having filed its libel herein on July 18, 1956 seeking recovery of damages from respondent United States of America on account of a certain collision on September 8, 1955 between the Dredge PACIFIC, a public vessel of the United States, and the SS F. E. WEYERHAEUSER, owned and operated by libelant, and both libelant and respondent having appeared by their respective proctors and respondent having filed herein on April 22, 1958 its Ancillary Petition for Injunction and Temporary Restraining Order praying that libelant be enjoined from prosecuting a certain third-party action against respondent in another district for damages arising from the same collision and a temporary restraining order having issued as prayed for April 22, 1958 and the libelant having now consented to the entry of this Order without contest,

It Is Hereby Ordered, Adjudged and Decreed:

That this Court has exclusive jurisdiction of the subject matter and jurisdiction of all persons and parties hereto.

That a permanent injunction issue out of and under the seal of this Court directed to the libelant, Weyerhaeuser Steamship Company, its agents, successors, deputies, servants, employees, attorneys proctors, and all persons acting by, through, or under them or any of them or by or through the order of any of them, enjoining and restraining them and each of them from

...filing, instituting, or prosecuting any third-party complaint, action, or proceeding whatever against respondent United States of America in that certain action entitled *Ostrom v. Weyerhaeuser Steamship Co.*, Civil No. 4255 in the United States District Court for the Western District of Washington.

Dated: April 28, 1958.

/s/ LOUIS E. GOODMAN

United States District Judge

Entry Consented to:

/s/ GRAHAM, JAMES & ROLPH

/s/ HENRY R. ROLPH

Proctors for Libelant

LLOYD H. BURKE

United States Attorney

/s/ KEITH R. FERGUSON

Special Assistant to the
Attorney General

/s/ GRAYDON S. STARING

Attorney, Admiralty and
Shipping Section
Department of Justice

/s/ JOHN F. MEADOWS

Attorney, Admiralty and
Shipping Section
Department of Justice
Proctors for Respondent
and Petitioner

[Endorsed]: Filed April 28, 1958.

[Title of District Court and Cause.]

WRIT OF INJUNCTION

The President of the United States of America, to
Weyerhaeuser Steamship Company, a corporation of the
State of Delaware having an office and place of busi-
ness at San Francisco, California, and its agents, suc-
cessors, deputies, servants, employees, attorneys, proc-
tors, and all persons acting by, through, or under them
or any of them and to each and every one of you,
Greeting:

Whereas, respondent United States of America has
heretofore filed an Ancillary Petition for Injunction and
Temporary Restraining Order herein in the United
States District Court for the Northern District of Cali-
fornia against you and each of you for certain relief
as therein set forth and has obtained an order and al-
lowance of a permanent injunction as prayed for in the
said Ancillary Petition:

Now, Therefore, we having regard to the matters in
the said Ancillary Petition contained, do hereby com-
mand and strictly enjoin you, the said Weyerhaeuser
Steamship Company, your agents, successors, deputies,
servants, employees, attorneys, proctors, and all persons
acting by, through, or under them or any of them and
each of you to refrain and desist wholly from filing,
instituting, or prosecuting any third-party complaint, ac-
tion, or proceeding whatever against respondent United
States of America in that certain action entitled Os-
trom v. Weyerhaeuser Steamship Co., Civil No. 4255
in the United States District Court for the Western
District of Washington, which commands and injunc-
tions you are respectively required to observe and obey:

And hereof fail not under penalty of law thence ensuing.

Witness, the Honorable Louis E. Goodman Judge of said Court, at the City and County of San Francisco, in the Northern District of California, this 28th day of April, 1958.

[Seal]

C. W. CALBREATH
Clerk.

/s/ By J. P. WELSH
Deputy Clerk.

Return of Service of Writ Attached.

[Endorsed]: Filed April 30, 1958.

[Title of District Court and Cause.]

STIPULATION FOR AMENDMENT
TO CROSS-LIBEL

It Is Hereby Stipulated by and between the parties hereto that Cross-Libellant United States of America may amend its Cross-Libel in the instant cause by changing Article VI thereof to read as follows:

VI.

That as a direct and proximate result of said collision and the neglect and fault of cross-respondent and the SS F. E. WEYERHAEUSER as aforesaid, cross-libellant has sustained damage in the sum of \$19,218.58.

as nearly as now can be estimated, no part of which has been paid although duly demanded, and in the further sum or sums which, in the event of a recovery against cross-libelant by the intervening libelants herein, may be awarded said intervening libelants against cross-libelant.

GRAHAM, JAMES & ROLPH

/s/ HENRY R. ROLPH

Proctors for Libelant

ROBERT H. SCHNACKE

United States Attorney

/s/ KEITH R. FERGUSON

Special Assistant to
Attorney General

/s/ JOHN F. MEADOWS

Attorney, Admiralty and
Shipping Section,
Department of Justice

Proctors for United States
of America.

It is so Ordered:

Oct. 8, 1958.

/s/ EDWARD P. MURPHY

United States District Judge

[Endorsed]: Filed Oct. 8, 1958.

[Title of District Court and Cause.]

AMENDMENT TO CROSS-LIBEL

Pursuant to the Stipulation of the parties, and order of the Court dated October 8, 1958, cross-libelant hereby amends its cross-libel by changing Article VI thereof to read as follows:

VI

That as a direct and proximate result of said collision and the neglect and fault of cross-respondent and the SS F. E. Weyerhaeuser as aforesaid, cross-libelant has sustained damage in the sum of \$19,218.58, as nearly as now can be estimated, no part of which has been paid although duly demanded, and in the further sum or sums which, in the event of a recovery against cross-libelant by the intervening libelants herein, may be awarded said intervening libelants against cross-libelant.

ROBERT H. SCHNACKE

United States Attorney

/s/ KEITH R. FERGUSON

Special Assistant to

Attorney General

/s/ JOHN F. MEADOWS

Attorney, Admiralty and

Shipping Section,

Department of Justice

Proctors for United States
of America

Duly Verified.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed Oct. 8, 1958.

[Title of District Court and Cause.]

Graham James & Rolph, 310 Sansome Street San Francisco 4, Proctors for Libelant and Cross-Respondent Weyerhaeuser.

Robert H. Schnacke, United States Attorney; Keith R. Ferguson, Special Asst. to the Attorney General; John F. Meadows, Attorney, Admiralty and Shipping Section, Department of Justice, Post Office Building San Francisco 1, Proctors for United States of America.

Derby, Cook, Quinby & Tweedt, 1000 Merchants Exchange Building, San Francisco 4, Proctors for Intervening Libelant.

MEMORANDUM OPINION

Roche, Judge:

This is an action by libelant, owner of the F. E. WEYERHAEUSER, brought under the provisions of Public Vessels Act, 46 U. S. C. 781 et seq., against respondent, owner of the PACIFIC, for damages sustained by the WEYERHAEUSER in a collision between the two vessels. Cross-libel by respondent for damages suffered by the Pacific.

At 5:30 P.M. on September 8, 1955, the WEYERHAEUSER, a steel "Liberty" type cargo vessel 441 feet long with a gross tonnage of 7218 tons, and the PACIFIC, a steel hopper dredge of 837 tons and 180 feet in length, collided approximately one and one-half miles west and slightly south of Cape Arago light off the Oregon coast.

At the time of the collision the sea was calm with variable breezes. There was dense fog and visibility was poor.

The WEYERHAEUSER was southbound from Coos Bay, Oregon to Los Angeles carrying a cargo of lumber. The PACIFIC was northbound from Bandon, Oregon to Coos Bay without cargo. Each vessel alleges having radar knowledge of the other's progress on an opposing course 18 minutes prior to the collision, at which time the two were 2.8 miles apart. Each remained almost continuously cognizant, by radar, of the other's position and bearing up to the time of the collision. The WEYERHAEUSER made at least one course change to port between 5:00 P.M. and the collision and was under way with her only lookout positioned on the bridge. The PACIFIC made three course changes to starboard in the half-hour preceding the collision. The bow of the PACIFIC collided with the starboard side of the WEYERHAEUSER and the two vessels parted again almost immediately. Communications were established some 30 minutes later and the vessels were able to proceed back to port unassisted.

Having considered the evidence, the law and the briefs and arguments of counsel, the court makes the following findings of fact with respect to each vessel.

The Weyerhaeuser

Respondent contends that the lookout on the WEYERHAEUSER was improperly positioned. It is undisputed that at the time of the collision no lookout was stationed in the bow of the WEYERHAEUSER, although one was positioned on the bridge. Rule 29

of the International Rules for Navigation at Sea requires that a proper lookout be kept.¹ The Rules themselves do not prescribe where the lookout must be posted, but the courts have been rigid in holding that lookouts must be stationed as far forward as possible, especially when vessels are proceeding under conditions of reduced or obstructed visibility. *The Ottawa*, 70 U. S. (3 Wall.) 268 (1865); *The Adrastus*, 190 F. 2d 883 (2d Cir. 1951); *The Bucentaur-Wilson Victory*, 125 F. Supp. 42 (S. D. N. Y. 1954). The WEYERHAEUSER's knowledge that another vessel was approaching would make the command even more imperative. The record reveals no substantial evidence that weather or topographical conditions excused compliance with the rule. The requirement is so strict that the presumption of contributory fault arising from its neglect is the same as that created by statutory violation. *The Adrastus*, supra; *The Bucentaur-Wilson Victory*, supra. Thus, the WEYERHAEUSER is liable for her fault unless she can show that it did not and could not have contributed to the collision. *The Pennsylvania*, 86 U. S. (19 Wall.) 125 (1873). She failed to do this; a bow lookout, being closer to the PACIFIC when she was sighted, might have given earlier warning and the time gained might have enabled the WEYERHAEUSER to avoid the collision.

Rule 16 of the International Rules states that a vessel proceeding under conditions of restricted visibility shall go at a "moderate" speed.² Such a speed is one that

¹33 U. S. C. 147a.

²33 U. S. C. 145n.

would enable a vessel to stop in one-half the range of visibility. The *Silver Palm*, 94 F. 2d 754 (9th Cir. 1938). Libelant contends that visibility was 375 feet. Assuming *arguendo* that figure to be correct, a "moderate" speed would have allowed the WEYERHAEUSER to stop in half that distance, or 188 feet from the forwardmost point on the ship that lookout was maintained. As the distance from bow to bridge on the WEYERHAEUSER is 205 feet, and the forwardmost lookout was positioned on the bridge, it follows that no speed could have been "moderate" under the circumstances. The evidence is convincing that the WEYERHAEUSER was moving fast when the two ships collided. The nature of the damage, the distance she traveled after collision, inadvertent admissions from her crew, dubious log and bell book entries and testimony from those aboard the PACIFIC who observed her all lead to that conclusion. And it is undisputed that she was under way until minutes before impact, with the same conditions prevailing. Again, the WEYERHAEUSER was unable to sustain the burden imposed upon her by statutory violation. The *Pennsylvania*, *supra*. She is liable for contributory fault on a second count.

Rule 18 provides that when two vessels are meeting end on, or nearly so, each shall alter course to starboard so as to effect a port to port passing.³ The record discloses that the WEYERHAEUSER and the PACIFIC admit detecting each other on opposing courses as early as 5:12 P.M. The PACIFIC turned

³33 U. S. C. 146b.

to starboard but the WEYERHAEUSER turned to port, and again they were on collision courses. Rule 18, written before the advent of radar as an aid to navigation, specifically refers to instances in which the vessels or their lights are visible to each other. This court can see no reason why its application should not extend to a situation in which two vessels "see" each other by radar.

It is argued that under the conditions of the instant case a right turn was not warranted because neither vessel could know that the other had radar and would abide by the rules. But even if the PACIFIC had not had radar and had maintained a straight course, a right turn by the WEYERHAEUSER would have avoided the collision and the same is true if the situation is reversed. Certainly, a left turn was totally unjustified. It is difficult to see how application of Rule 18 under these conditions would have anything but a positive effect upon safety.

Two cases are cited in support of the position that the meeting and passing rules do not apply in fog. *Borghich v. Ancich*, 191 F. 2d 392 (9th Cir. 1951); *The George F. Randolph*, 200 Fed. 96 (S. D. N. Y. 1912). Both are distinguishable from the instant case. In the former, fog made the burdened vessel unable to determine that there was another vessel to starboard and in the latter, both vessels were uncertain of each other's location in the fog. Here, the Weyerhaeuser knew the location and course of the Pacific when she was almost three miles away. The court must conclude that the WEYERHAEUSER should have turned right instead of left, and that her failure to do so is a

statutory violation. She was unable to prove that her fault could not have contributed to the collision, and under the Pennsylvania rule, she is again liable.

The Pacific

Libellant asserts that the PACIFIC was proceeding at an "immoderate" rate of speed in violation of Rule 16.⁴ Respondent alleges that the PACIFIC was moving at Slow Ahead and that her headway was practically stopped when the WEYERHAEUSER struck her. The testimony from those aboard the PACIFIC is inconsistent and contradictory. The tendency of officers and crew to "stick by the ship" in such matters is well known. The Silver Palm, *supra*. The PACIFIC's logs are grossly inadequate. The absence of log entries tends to discredit the testimony of witnesses from the vessel on disputed issues. *Arkansan-Knoxville City*, 1939 A. M. C. 353 (S. D. Cal.)

Second Assistant Engineer Martin of the PACIFIC recorded the orders that he received immediately prior to the collision in his personal notebook and in the engine room log. The notebook relates, "... 5:30 P M . . . Heavy Fog—Whistle Operating—Martin on Throttles—Engines Full Ahead—Received 'Slow' port and starboard followed by immediate Full Astern . . . About 10 seconds later felt impact from bow . . . Time from Slow Ahead to Full Astern not over 5

⁴33 U. S. C. 145n.

seconds." These observations were recorded shortly after the collision, were ~~later~~ confirmed by Martin (although loyalty induced him to attempt to moderate their impact at the trial) and have not been shown to be influenced by considerations reflecting upon their credibility. In the event of conflict between deck officers and engine room personnel as to a vessel's speed changes, the testimony and records of the latter are entitled to greater credence because they have better means of knowledge. *Beverly v. Brinton*, 1934 A. M. C. 316 (S. D. N. Y. 1915). Upon the presumptions created by the absence or alteration of log entries and the unconscious or reluctant admissions against the ship, many cases must be decided. *The Ernest H. Meyer*, 84 F. 2d 496 (9th Cir. 1936). The court finds that the PACIFIC was proceeding at her Full speed of 7 knots prior to the collision.

Captain Albee testified that in his opinion the PACIFIC could come to a stop from Full Ahead in three lengths of the vessel, or approximately 540 feet. The most generous estimates of visibility at the time in question placed it at 375 feet. It is clear that the PACIFIC was not proceeding within the "moderate" speed required by statute, since she was not able to stop within one-half the range of visibility, or 188 feet. *The Silver Palm*, *supra*. The record substantiates this conclusion and indicates that had the PACIFIC been able to stop in her share of the range of visibility the collision

might have been avoided. Respondent was unable to overcome the presumption of contributory fault arising from the PACIFIC's violation of Rule 16. The Pennsylvania, *supra*.

Respondent contends that the PACIFIC's faults; if any, were committed in extremis and may be excused. But the nature of an error in extremis is that it is committed when collision is imminent and there is no opportunity to exercise proper judgment. The Chinook, 34 F. 2d 614 (2d Cir. 1929). There are no hard or fast rules to apply, but the error of the PACIFIC was clearly not committed in extremis. Captain Albee admits turning the PACIFIC sharply to starboard five minutes before the collision and the preponderance of evidence shows that the PACIFIC then proceeded at "immoderate" speed on her new course. Evidently Albee's intention was to remove the PACIFIC from the danger area as quickly as possible in whatever time remained. Albee may have been unfortunate but the court cannot avoid the conclusion that prudent seamanship would have been a satisfactory cure.

The International Rules require that a vessel hearing the fog signal of another vessel, the position of which is not ascertained, shall stop her engines and then navigate with caution until the danger is past.⁵ The record discloses that neither vessel stopped her engines upon

⁵33 U. S. C. 145n.

first hearing the fog signal of the other, but that at the time, each had the other's position located on her radar screen. The court is of the opinion that "ascertainment" of a vessel's position by radar is adequate justification for failure to comply with the technical requirement that engines be stopped.

In view of the foregoing it is the finding of this court that the collision was caused by the mutual fault of the WEYERHAEUSER and the PACIFIC.

Libellant and cross-respondent Weyerhaeuser Steamship Company and respondent and cross-libellant United States of America are each entitled to recover from the other one-half of all provable damages and court costs sustained as a result of this collision according to the settled admiralty law in cases of mutual fault collisions.

In accordance with the foregoing, if the parties cannot agree on the amount of damages, the matter shall be referred to a special commissioner to take evidence upon the amount of damages sustained by each party and to calculate the net balance payable as between the Weyerhaeuser Steamship Company and the United States of America.

It Is So Ordered.

Date: July 2nd 1959.

/s/ MICHAEL J. ROCHE,

United States District Judge.

[Endorsed]: Filed July 2, 1959.

[Title of District Court and Cause.]

Graham James & Rolph, 310 Sansome Street, San Francisco, 4. Proctors for Libelant and Cross-Respondent Weyerhaeuser.

Derby Cook, Quinby & Tweedt, 1000 Merchants Exchange Building, San Francisco 4 Proctors for Intervening Libelant.

Lynn J. Gillard, United States Attorney; Keith R. Ferguson, Special Asst. to the Attorney General; John F. Meadows, Attorney, Admiralty and Shipping Section, Department of Justice, Post Office Building, San Francisco 1. Proctors for United States of America.

SUPPLEMENT TO OPINION

Roche, Judge:

The following paragraphs are hereby added to the Memorandum Opinion of this court in the above-entitled matter filed July 2, 1959:

Intervening libelants St. Paul Fire & Marine Insurance Co., Fireman's Fund Insurance Co., and Boston Insurance Co. are entitled to recover from respondent and cross-libelant United States of America all recoverable damages sustained by them and their insured cargo owners as the result of this collision, together with costs.

With respect to Civil action No. 4255 pending in the U. S. District Court for the Western District of Washington entitled Ostrom vs. Weyerhaeuser Steamship

Company, which action involves a claim for personal injuries allegedly sustained by said Ostrom in this collision, if the ascertainment of the amount of recoverable damages as between Weyerhaeuser Steamship Company and the United States is referred to a special commissioner then said special commissioner shall report to this court the amount if any paid by Weyerhaeuser Steamship Company to said Ostrom in compromise of said lawsuit or the satisfaction of final decree therein leaving the question as to whether such an amount is a recoverable item of said Weyerhaeuser Steamship Company's damages herein for decision by this court.

It Is So Ordered.

Date: July 13th, 1959.

/s/ MICHAEL J. ROCHE,
United States District Judge.

Approved as to Form:

GRAHAM JAMES & ROLPH,

/s/ By HENRY R. ROLPH,

DERBY, COOK, QUINBY & TWÉEDT,

/s/ By STANLEY J. COOK,

LYNN J. GILLARD,

KEITH R. FERGUSON,

/s/ By JOHN J. MEADOWS.

[Endorsed]: Filed July 13, 1959.

[Title of District Court and Cause.]

STIPULATION

It Is Hereby Stipulated by and between the libelant Weyerhaeuser Steamship Company, a corporation, and respondent United States of America that the sum of Sixteen Thousand Dollars (\$16,000.00) is a reasonable amount to be paid by libelant Weyerhaeuser Steamship Company, a corporation, a full settlement of that certain civil action No. 4255 pending in the United States District Court for the Western District of Washington, entitled Reynold E. Ostrom, Plaintiff, vs. Weyerhaeuser Steamship Co., a corporation, Defendant; it being agreed that the reasonableness of the amount of settlement is the only matter stipulated herein, all other defenses and claims of each of the parties hereto being reserved.

Dated this 10th day of November, 1959.

GRAHAM, JAMES & ROLPH,

/s/ By HENRY R. ROLPH,

Proctors for Libelant Weyerhaeuser
Steamship Company,

LYNN J. GILLARD,

United States Attorney,

/s/ KEITH R. FERGUSON,

Special Assistant to the
Attorney General, &

/s/ JOHN F. MEADOWS,

Attorney, Department of Justice
Admiralty and Shipping Section,
Proctors for Respondent,
United States of America.

[Endorsed]: Filed Nov. 10, 1959.

[Title of District Court and Cause.]

STIPULATION RE DAMAGES

It Is Stipulated by and between the parties hereto that:

1. The damages sustained by libelant and cross-respondent, Weyerhaeuser Steamship Company proximately resulting from the collision between the U. S. Army Dredge PACIFIC and the Steamship F. E. WEYERHAEUSER on September 8, 1955, amount to the total sum of \$27,652.13, which sum does not include that further item of claimed damages described hereinafter under paragraph 4;

2. The damages sustained by respondent and cross-libelant United States proximately resulting from said collision amount to the total sum of \$16,949.12;

3. The damages sustained by intervening libelants proximately resulting from said collision are as follows:

a. St. Paul Fire & Marine Insurance Co.	\$19,122.75
b. Fireman's Fund Insurance Co.	923.85
c. Boston Insurance Co.	443.54
Total sum of	\$20,490.14

4. Libelant and cross-respondent Weyerhaeuser Steamship Company paid to Reynold E. Ostrom, a Civil Service employee serving as a seaman (a cabin attendant), at the time of the collision, on the U. S. Army Dredge PACIFIC, a public vessel of the United

States, the sum of \$16,000.00 in full settlement of the case of Reynold E. Ostrom v. Weyerhaeuser Steamship Company, No. 4255 in the United States District Court for the Western District of Washington, a suit for claimed injuries sustained as a result of the collision between the SS F. E. WEYERHAEUSER and the U. S. Army Dredge PACIFIC on September 8, 1955; a stipulation by and between Weyerhaeuser Steamship Company and the United States has been filed herein prior to said settlement providing as follows:

"That the sum of \$16,000.00 is a reasonable amount to be paid by libelant Weyerhaeuser Steamship Company, a corporation, in full settlement of that certain civil action No. 4255 pending in the United States District Court for the Western District of Washington entitled Reynold E. Ostrom, Plaintiff, v. Weyerhaeuser Steamship Company, a corporation, defendant, it being agreed that the reasonableness of the amount of settlement is the only matter stipulated herein, all other defenses and claims of each of the parties hereto being reserved."

5. Said Reynold E. Ostrom was at all times material an employee of the United States within the coverage of the Federal Employees' Compensation Act, Title 5, United States Code § 751, et seq., and accepted and was paid by the United States compensation under said Compensation Act in the amount of \$329.01, covering the period October 12, 1955 to and including Novem-

ber 23, 1955, for claimed injuries occurring as a result of the collision between the SS F. E. WEYERHAEUSER and the U.S. Army Dredge PACIFIC on September 8, 1955, while said Reynold E. Ostrom was serving as said Civil Service employee on the PACIFIC.

It Is Further Stipulated by and between libelant and cross-respondent Weyerhaeuser Steamship Company and respondent and cross-libelant United States that the following issues shall be submitted to the Honorable Michael J. Roche for decision:

a. In this case, which has been decided by the Court to be a collision caused by mutual fault, is the United States liable for contribution to Weyerhaeuser Steamship Company on account of the settlement made by Weyerhaeuser Steamship Company to Reynold E. Ostrom, and if so, in what amount?

b. In the computation of damages herein, is the United States entitled to reimbursement for compensation paid Reynold E. Ostrom under the Federal Employees' Compensation Act?

It Is Further Stipulated by and between libelant and cross-respondent Weyerhaeuser Steamship Company and respondent and cross-libelant United States that said parties or either of them, may introduce into evidence in this case in addition to any other evidence relevant to the above issues a copy of Reynold E. Ostrom's compensation file, or relevant portions thereof.

Dated this 5th day of May, 1960.

GRAHAM JAMES & ROLPH.

/s/ **By HENRY R. ROLPH,**

**Proctors for Libelant and Cross-
Respondent.**

LYNN J. GILLARD,

United States Attorney.

/s/ **KEITH R. FERGUSON,**

**Special Assistant to
Attorney General.**

/s/ **JOHN F. MEADOWS,**

**Attorney, Admiralty and Shipping
Section Department of Justice,**

**Proctors for Respondent and Cross-
Libelant, United States of America**

DERBY, COOK, QUINBY & TWEEDT,

/s/ **By STANLEY J. COOK,**

Proctors for Intervening Libelants.

[Endorsed]: Filed May 17, 1960.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS
OF LAW ON DAMAGES

In the above entitled cause an interlocutory decree was made and entered by Memorandum Opinion, filed July 2, 1959, and a Supplement to Opinion filed July 13, 1959, which said opinions constituted the Court's findings, conclusions and interlocutory decree on the merits in this collision case. In and by said findings, conclusions and interlocutory decree, this Court found and concluded that this collision was caused by the mutual fault of both vessels, the F. E. WEYERHAEUSER and the U. S. Army dredge PACIFIC and ordered that damages and costs be equally divided as between libelant and cross-respondent, Weyerhaeuser Steamship Co., as owner of the steamship F. E. WEYERHAEUSER, and respondent and cross-libelant, United States of America, as owner of the U.S. Army dredge PACIFIC, according to the settled admiralty law in cases of mutual fault collisions, and further ordered that intervening libelants recover their provable damages and costs from the United States.

Thereafter the matter of damages was submitted to the Court upon a stipulation as to the facts, and a legal issue raised upon one of the items of damage claimed by libelant and cross-respondent, Weyerhaeuser Steamship Company. This legal issue was briefed, orally argued, documentary evidence offered and admitted thereon, and submitted to this Court for decision.

Upon the written stipulation of the parties, the Court makes the following:

Findings of Fact

I.

The physical and detention damages sustained by the two vessels in this collision were as follows:

To the steamship F. E. WEYER—

HAEUSER	\$27,652.13
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To the U. S. Army dredge PACIFIC	\$16,949.12
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II.

In said collision intervening libelants, as subrogated insurers of cargo on the F. E. WEYERHAEUSER sustained damages consisting of general average payments which they were required to and did make to the owner of the F. E. WEYERHAEUSER, as follows:

St. Paul Fire and Marine Insurance

Co.	\$19,122.75
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Fireman's Fund Insurance Co.	923.85
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Boston Insurance Co.	443.54
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III.

In and as a result of said collision, one, Reynold E. Ostrom, sustained personal injuries. Said Ostrom was a Civil Service employee of the United States of America then and there serving aboard the PACIFIC and was within the coverage of the Federal Employees' Compensation Act, 5 U.S. Code Section 751 et seq. Under the Federal Employees' Compensation Act, Ostrom became entitled to receive from the United States of America, and did so receive, the sum of \$329.01 as statutory compensation. No written assignment was taken by the United States from Ostrom.

Ostrom also filed a separate action against Weyerhaeuser Steamship Company to recover general damages for his said injuries. This action then pending in the United States District Court for the Western District of Washington, Civil Action No. 4255, entitled Reynold E. Ostrom, Plaintiff vs. Weyerhaeuser Steamship Company, a corporation, was settled by Weyerhaeuser paying \$16,000.00 to Ostrom, which said settlement was reasonable in amount. From these settlement proceeds, Ostrom has repaid the aforesaid sum of \$329.01 to the United States of America, and said figure has no further significance herein.

Upon the foregoing Findings of Fact the Court draws and makes the following

Conclusions of Law

I.

The amount of \$16,000 paid by Weyerhaeuser Steamship Company in settlement of the Ostrom claim is an item of damage to be allowed to Weyerhaeuser Steamship Company in settling the balance between libelant and respondent on a divided damages basis.

II.

Intervening libelants are entitled to recover from respondent United States of America their total damages as set forth in Finding No. II, together with their costs and with interest at 4% per annum from date of entry of final decree herein, as provided by the Public Vessels Act, 46 U.S. Code 782.

III.

The amount payable by the United States of America to intervening libelants as above is an item of prov-

able damage to be allowed to the United States of America in settling the balance between libelant and respondent on a divided damages basis.

IV.

The provable and recoverable damages of libelant and respondent are as follows:

Of Weyerhaeuser Steamship Company:

\$27,652.13 physical and detention damages of the
F. E. WEYERHAEUSER

\$16,000.00 paid to Ostrom

\$43,652.13 Total provable damages

Of the United States of America:

\$16,949.12 physical and detention damages of the
PACIFIC

\$20,490.14 payable to intervening libelants

\$37,439.26 Total provable damages

V.*

Since the total provable damages of Weyerhaeuser Steamship Company exceed those of the United States of America by \$6,212.87, Weyerhaeuser Steamship Company is entitled to recover one-half of said excess as the affirmative balance on the cross adjustment of the total damages between the parties, or \$3,106.44, from the United States of America, plus interest thereon at 4% from entry of final decree as provided by the Public Vessels Act, 46 U. S. Code 782.

VI.

Respondent United States shall recover from libelant Weyerhaeuser Steamship Company one-half of the total taxable costs taxed against respondent in favor of intervening libelants.

VII.

The allowance of costs and interest being within the discretion of the Court, and in accordance with the Memorandum Opinion of July 2, 1959 and the Supplement to Opinion filed July 13, 1959, taxable costs of Weyerhaeuser Steamship Company and the United States of America shall be shared equally between them and, when the same have been taxed, the party having the larger amount of costs is entitled to recover one-half the excess from the other party. No party shall be credited with any interest on any item of damage prior to final decree, and interest thereafter shall be payable as set forth in conclusions II and V, above.

Dated: June 17th, 1960.

/s/ MICHAEL J. ROCHE,
United States District Judge.

Approved as to Form:

LYNN J. GILLARD,
United States Attorney.

/s/ KEITH R. FERGUSON,
Special Asst. to the
Attorney General.

/s/ JOHN F. MEADOWS,
Attorney, Admiralty and Shipping Section
Department of Justice.

DERBY, COOK, QUINBY, TWEEDT,

/s/ By STANLEY J. COOK.

GRAHAM JAMES & ROLPH,

/s/ By HENRY R. ROLPH.

[Endorsed]: Lodged June 13, 1960; Filed June 17, 1960.

In the United States District Court for the Northern
District of California, Southern Division

In Admiralty

No. 27359

WEYERHAEUSER STEAMSHIP COMPANY, a
corporation,

Libelant,

v.

UNITED STATES OF AMERICA,

Respondent.

UNITED STATES OF AMERICA,

Cross-Libelant,

v.

WEYERHAEUSER STEAMSHIP COMPANY, a
corporation,

Cross-Respondent.

ST. PAUL FIRE & MARINE INSURANCE CO.,
a corporation; BOSTON INSURANCE CO., a
corporation, and FIREMAN'S FUND INSUR-
ANCE CO., a corporation,

Intervening Libelants.

FINAL DECREE

The above entitled cause having been fully tried and
decided, and the Court having heretofore made inter-
locutory Findings of Fact and Conclusions of Law by
Memorandum Opinions filed herein, and having there-
after made Findings of Fact and Conclusions of Law as
to damages,

Now, Therefore, in accordance with the aforesaid opinions, findings and conclusions,

It is finally Ordered, Adjudged and Decreed as follows:

1. Libelant Weyerhaeuser Steamship Company shall have and recover from respondent United States of America the sum of \$3,106.44, together with interest thereon at 4% per annum from date hereof.

2. The costs of libelant Weyerhaeuser Steamship Company being taxed at \$313.90, and the costs of respondent United States being taxed at \$432.26, the party having the larger amount of such costs, to wit: The United States shall recover one-half the excess thereof, to wit: \$59.18, from the other party, to wit: Weyerhaeuser SS Co., and respondent United States shall recover from libelant Weyerhaeuser Steamship Company one-half of the total costs of \$66.00, taxed against respondent United States and in favor of intervening libelants.

3. When the costs of said libelant and respondent shall have been taxed, the party having the larger amount of costs shall recover one-half the excess thereof from the other party.

4. Intervening libelant St. Paul Fire and Marine Insurance Company shall have and recover from respondent United States of America the sum of \$19,122.75, together with interest thereon at 4% per annum from date hereof, and its costs of suit, taxed at \$22.00.

5. Intervening libelant Fireman's Fund Insurance Co. shall have and recover from respondent United States of America the sum of \$923.85, together with interest thereon at 4% per annum from date hereof, and its costs of suit, taxed at \$22.00.

6. Intervening libelant Boston Insurance Company shall have and recover from respondent United States of America the sum of \$443.54, together with interest thereon at 4% per annum from date hereof, and its costs of suit, taxed at \$22.00.

Done in open court this 17th day of June 1960.

/s/ MICHAEL J. ROCHE,
United States District Judge.

Approved as to Form:

LYNN J. GILLARD,
United States Attorney.

KEITH R. FERGUSON,
Special Assistant to the
Attorney General.

/s/ By JOHN F. MEADOWS,
DERBY, COOK, QUINBY, TWEEDT,

/s/ By STANLEY J. COOK,
GRAHAM JAMES & ROLPH,
/s/ By HENRY R. ROLPH.

[Endorsed]: Lodged June 6, 1960; Filed June 17,
1960; Entered June 20, 1960.

[Title of District Court and Cause.]

MOTION FOR REHEARING

To the Honorable Judge of the Above-Entitled Court
Sitting in Admiralty: _____

Respondent and cross-libelant United States moves the Court for a rehearing and to alter and amend the Conclusions of Law and Final Decree in connection with the decision of this Court rendered on June 1, 1960 requiring contribution from the United States to libelant and cross-respondent Weyerhaeuser Steamship Company toward the settlement made by Weyerhaeuser of the suit entitled Reynold E. Ostrom v. Weyerhaeuser Steamship Company in the U. S. District Court for the Western District of Washington, Civil No. 4255. This motion is limited to the Ostrom matter and is grounded upon what the United States considers to be manifest error by the Court in its Conclusions of Law and Final Decree in that the Conclusions of Law, based on the facts as found by the Court, and the Final Decree as to the Ostrom issue are in conflict with the provisions of the Federal Employees' Compensation Act, with the decisions of the courts both in civil and admiralty cases, and with the principles of admiralty law as established and settled by the U. S. Supreme Court and lower Federal courts.

Grounds for This Motion for Rehearing

First: That the Conclusions of Law and Final Decree are in violation of the express statutory provisions of §757(b), Title 5, United States Code, the Federal Employees' Compensation Act, which section

precludes liability of the United States, outside of statutory compensation, under any Federal tort liability statute on account of injuries to a Civil Service employee and thereby prohibits contribution to third parties such as Weyerhaeuser Steamship Company.

Second: That the Conclusions of Law and Final Decree are in violation of §757(b), Title 5, United States Code, and contrary to the applicable decisions of the Supreme Court of the United States, the various Federal Courts of Appeal and District Courts in that by said Conclusions of Law and Final Decree the United States is held to be a joint tort-feasor with Weyerhaeuser as to an injured Civil Service employee to whom, because of the Federal Employees' Compensation Act, there could be no common liability on the part of the United States to respond in damages for tort.

Discussion and Argument

I.

§757(b), Title 5 United States Code, the Federal Employees' Compensation Act, states where material as follows:

"The liability of the United States * * * with respect to the injury * * * of an employee shall be exclusive and in place of all other liability of the United States * * * to the employee, his legal representative * * * and anyone otherwise entitled to recover damages from the United States * * * on account of such injury * * *, in any direct judicial proceedings in a civil action or in admiralty, whether administrative or judicial, under any other workman's compensation law or under any Federal tort liability statute * * *."

Under the terms of this section the liability of the United States under the Compensation Act is exclusive, whether the claim against the United States is made by the injured employee or by third parties seeking contribution from the United States as a joint tortfeasor for payments they made to the employee on account of his injuries. That third parties who have paid an employee for injuries compensable under this and the other Federal Compensation statute (the federal Longshoremen's and Harbor Workers' Compensation Act, §§901, et seq., Title 33 U. S. C.) are precluded by these Compensation Acts from collecting any part of the payment from the employer has been held both in civil and in admiralty cases. *American Mutual Ins. Co. v. Matthews*, 182 F. 2d 322 (2d Cir. 1950), *Christie v. Powder Power Tool Corp.*, 124 F. Supp. 693 (D. C. 1954), *Brown & Root v. U. S.*, 92 F. Supp. 257 (S. D. Tex. 1950), affirmed 198 F. 2d 138 (5th Cir. 1952), *Lo Bue v. U. S.*, 188 F. 2d 800 (2d Cir. 1951), *Crawford v. P&T, Inc.*, 206 F. 2d 784 (3d Cir. 1953), and *Johnson v. U. S.*, 79 F. Supp. 448 (D. Ore. 1948), to cite a few of the many decisions. In this regard, the court in the case of *Standard Wholesale Phosphate & Acid Works, Inc. v. Rukert Terminal Corp.* (1949), 193 Md. 20, 65 A. 2d 304, stated:

"The employer's conformance with the statute, by providing compensation in all cases regardless of fault, prevents recovery against him on the ground of negligence. The statute declares his liability for compensation to be exclusive. If it should be construed to preserve his liability, for the payment of a sum measured in whole or in part by the damages sustained by

the employee, merely because the negligence of a third party concurred, or is claimed to have concurred, with his own in producing the injury, his liability for compensation would not be exclusive. It is probable that his liability would in most cases exceed the limits set up in the statute. We think it is immaterial whether his liability to a joint tortfeasor stems from a statutory right to contribution or from general principles of the admiralty law. In either event it is essentially a liability to pay, or share in the payment of, damages for the injury to his employee, of which the statute relieves him. We think the appellant falls squarely within the definition of 'anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury.' It follows that his right to indemnity or contribution is foreclosed by the Act, and hence the employer cannot be impleaded." (Italics supplied.)

The Supreme Court of the United States held that there could be no contribution against the employer under the Federal Longshoremen's and Harbor Workers' Act in *Halcyon v. Haenn Ship Ceiling & Refitting Corp.*, 342 U. S. 282, and the New York Court of Appeals in *Cardinal v. State of New York*, 304 N. Y. 400, 413, 107 N. E. 2d 569, 575, 1952 A. M. C. 1874, 1883 summarized the *Halcyon* holding as follows:

"The Supreme Court held in *Halcyon Lines vs. Haenn Ship Ceiling & Refitting Corp.*, substantially this: that, while substantive maritime law has usually decreed contribution as between joint tortfeasors, see *Erie R. R. Co. v. Erie & Western Transportation Co.*, *supra*; *The Ira M. Hedges*, *supra*; *The Wonder* (2 Cir.), *supra*;

Barbarino v. Stanhope S. S. Co. (2 Cir.), *supra*,¹ [per] Learned Hand, J.: and the Green and Severn decisions in these very cases, *supra*, nevertheless, such contribution should not be enforced against an employer joint tortfeasor, where the injury was to one of his employees who was entitled to compensation under the Federal Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. Code, sec. 901 et seq. As we read the cases, *Halcyon* is the first one containing an authoritative holding, at least by the highest court, that the ordinary maritime law system of contribution between joint tortfeasors was not available in such a situation (there was a holding against such contribution in the Second Circuit, in 1950, in *American Mutual Liability Ins. Co. vs. Matthews*, *supra*, long after the settlement here, but even then, as the Circuit Court noted, the majority of the lower court decisions were the other way, as was, it seems, the Second Circuit's own earlier case of *Rich vs. United States*, 1949 A. M. C. 2079, 177 F. (2d) 688)." (Footnote added.)

¹Two of the cases cited (*Erie R.R. Co. v. Erie & Western Transp. Co.*, 204 U.S. 220, and *The Ira M. Hedges*, 218 U.S. 264) are mutual fault collision decisions. *The Wonder*, 79 F. 2d 312 (2d Cir. 1935) concerned a ship's propeller being fouled by a cable and contribution was required. In *Barbarino v. Stanhope*, 151 F. 2d 553 (2d Cir. 1945), contribution between a ship-owner and a stevedore firm was involved (no Compensation Act was concerned evidently), and the Court stated: "* * * the suit is in admiralty, where contribution between joint tort-feasors has existed since 1875. *The Alabama*, 92 U.S. 695.)" (Page 555.) *The Alabama* incidentally is a mutual fault collision case.

The Findings of Fact on the Ostrom issue show that Ostrom was a Civil Service employee within the coverage of the Federal Employees' Compensation Act and was paid compensation under that Act for his injuries stemming from the collision. Further, the Findings show that Weyerhaeuser's settlement with Ostrom was for the same injuries. (Finding of Fact III.) Conclusion of Law I stating "The amount of \$16,000 paid by Weyerhaeuser Steamship Company in settlement of the Ostrom claim is an item of damage to be allowed to Weyerhaeuser Steamship Company in settling the balance between libelant and respondent on a divided damages basis," is in error and consequently Conclusions of Law IV and V and the Final Decree are in error. By these Conclusions and Decree the Court has erroneously held that §757(b) of Title 5, U. S. C. does not preclude liability of the United States additional to the compensation provided by the Federal Employees' Compensation Act, or, in other words, that §757(b) does not preclude an action for contribution against the employer.

Even Weyerhaeuser Steamship Company did not argue that the wording of § 757(b) failed to preclude third party recovery from the United States. Instead, Weyerhaeuser argued—its main point, as best can be determined from its Brief—as follows:

"It is now evidently the Government's position, subsequent to the determination of mutual fault by this Court, that the long established admiralty rule should not be applied in this case against the United States, advancing the argument that it should be immune as Congress has provided an exclusive system of compen-

sation for personal injuries to its employees under the Federal Employees' Compensation Act.

"For the reasons hereinafter mentioned it is submitted that the payment made to a governmental employee injured in and as a result of this collision should be included as part of the collision damages of the Weyerhaeuser Steamship Company, because by enactment of the Public Vessels Act (Title 46, U. S. C. 781) the Government has assumed the liabilities that are imposed on private litigants under admiralty principles."

Weyerhaeuser then states that since private shipowners have to contribute to personal injury payments in collision cases, the United States should, too. (Weyerhaeuser's Brief filed herein May 13, 1960, on Page 6, line 23 to line 7, page 7; see also Page 7, line 20 to line 4, Page 8; Page 11, lines 6-31; and Page 5, lines 10-24.) Thus, since it is evidently admitted by Weyerhaeuser (as it would have to be in view of the wording of § 757(b) and the authorities above-mentioned) that § 757(b) does cover actions against the United States by third parties, Weyerhaeuser's contention is simply that the phrase in § 757(b): "* * * any Federal tort liability statute" must be interpreted as not including the Public Vessels Act.

If the Court accepted this argument and it is the basis for the ruling that § 757(b) does not preclude contribution here, then this, too, is clearly erroneous, inasmuch as § 757(b) precludes liability of the United States "under any Federal tort liability statute." The statutes governing remedies against the United States (as do both the Public Vessels Act and the Federal

Employees' Compensation Act) must be fitted "as intelligently and fairly as possible into the entire statutory system of remedies against the Government to make a workable, consistent and equitable whole." *Johansen v. U. S.*, 343 U. S. 427 (1952). An interpretation of the Public Vessels Act as excluding Federal Employees' Compensation Act ignores this principle of statutory interpretation. Further, an interpretation that § 757(b) cannot be a defense because the Public Vessels Act puts the United States in the position of a private litigant cannot stand. As between private parties situated as the parties are here, no recovery of contribution could be had in the face of a governing statute like § 757(b). Similar statutes actually do govern and bar liability for contribution between private parties, as exemplified by State Workmen's Compensation laws and the Federal Longshoremen's and Harbor Workers' Act which also provide for the exclusive liability thereunder of private employers who are covered. See *Peak Drilling Co. v. Halliburton Oil Well Cement Co.*, 215 F. 2d 368 (10th Cir. 1954) (Oklahoma Workmen's Compensation Law), *Amer. Dist. Tel. Co. v. Kittleson*, 179 F. 2d 946 (8th Cir. 1950) (Iowa Compensation Act), and 2 *Larson, Workmen's Compensation Law*, Page 230.

It is respectfully submitted that the Court has committed error in concluding that Weyerhaeuser is entitled to contribution toward the Ostrom settlement, whether the basis for the Court's conclusion is that § 757(b) does not cover contribution by its very terms or, as Weyerhaeuser contended, that the Public Vessels Act is an exception to that section.

II.

By its Conclusions of Law ¶ IV, and V and the Final Decree herein the Court has placed itself in error on a further ground, having thereby concluded that the United States is a joint tort-feasor as to Ostrom. This is implicit in the Court's Conclusions because, as to third party claims, the principle of contribution between ships involved in a collision found to have been caused by mutual fault is the same principle obtaining generally in civil and admiralty cases. This principle requires joint tortfeasance as to damaged third parties before there can be contribution.

As to contribution in admiralty, see the quotations from *Cardinal v. State of N. Y.*, *supra*, and *American Mutual Liability Insurance Co. v. Matthews* at Page 11 of the Answering Brief of the United States filed herein May 27, 1960. As to contribution on the civil side, see *Brown & Root v. U. S.*, 92 F. Supp. 257, 261 [S. D. Tex., 1950], affirmed 198 F. 2d 138 [5th Cir. 1952]. Both the admiralty side and the civil side require joint tortfeasance and therefore common liability as to the injured third party on the part of both the party seeking contribution and the one from whom it is sought. There is thus no difference in admiralty and at law in the application of the principle of contribution. That a collision is involved certainly makes no difference, for liability to contribute in a mutual fault collision case "originates in the law of torts as applied by the maritime law." *The Cockatoo*, 61 F. 2d 889, 891 [2d Cir., 1932]. See also *Rich v. U. S.*, 177 F. 2d 688, 691 [2d Cir. 1949], where the court stated, referring to the claims of cargo owners in mutual fault collision cases:

"Nor do we now find it necessary to decide whether the rule established in *The Chattahoochee*, 173 U. S. 540, * * * pertaining to collision cases involving § 3 of the Harter Act, 46 U. S. C. §§ 190, et seq., and permitting contribution, should be followed here."

The Findings of Fact and Conclusions of Law on the damages herein treat the cargo claim against the United States and the Ostrom settlement by Weyerhaeuser in the same manner, thus recognizing that both depend on whether or not there is a right to contribution. (It has already been shown that the Federal Employees' Compensation Act does not permit contribution; The Harter Act was interpreted in *The Chattahoochee*, 173 U. S. 540, 555 [1899], differently. See *Amer. Mut. Insurance Co. v. Matthews*, 182 F. 2d 322, 324 [2d Cir. 1950]: "The Harter Act was not intended to affect the liability of one vessel to the other in a collision case; 'the relations of the two colliding vessels * * * remain unaffected by this act,'" citing *The Chattahoochee*.)

The United States cannot, however, be a joint tortfeasor as to Ostrom. Under the compensation statutes, as stated in 2 *Larson, Workmen's Compensation Law*, at Page 230, §.76.21:

"* * * the employer is not jointly liable (along with a third party also causing the injury) to the employee in tort; the liability that rests upon the employer (under the Workmen's Compensation acts) is an absolute liability irrespective of negligence, and this is the only kind of liability that can devolve upon him whether he is negligent or not. The claim of the employee against the employer is solely for statutory benefits;

his claim against the third person is for damages. The two are different in kind and cannot result in a common liability." (Matter in brackets supplied.)

(See also *Amer. Mut. Liability Ins. Co. v. Matthews*, 182 F. 2d 322, 323 [2d Cir. 1950].) In other words, the Compensation Acts substitute an absolute duty to pay the employee compensation upon injury for the common law duty to respond in damages only if negligent.

It is respectfully submitted that the Court has committed error in this second particular, as well as in the first set forth above. Conclusions of Law I, IV, and V and the Final Decree should be altered and amended to show that Weyerhaeuser Steamship Company is not entitled to claim the amount of the Ostrom settlement as an item of recoverable damage and thereby secure contribution from the United States, Ostrom's employer, to that settlement for injuries covered by the Federal Employees' Compensation Act.

LAURENCE E. DAYTON

United States Attorney.

/s/ KEITH R. FERGUSON,

Special Assistant to the Attorney
General.

/s/ JOHN F. MEADOWS,

Attorney, Admiralty and Shipping
Section Department of Justice.

Proctors for Respondent and Cross-
Libelant, United States of
America.

[Endorsed]: Filed June 27, 1960.

[Title of District Court and Cause.]

RESPONDENT AND CROSS-LIBELANT'S SUG-
GESTION OF ERROR IN THE OPINION
OF THIS COURT IN ITS APPLICATION OF
RADAR LOCATION AS "VISIBLE" AND
"ASCERTAINMENT" WITHIN THE MEAN-
ING OF RULES 18 AND 16 OF THE IN-
TERNATIONAL RULES OF THE ROAD

As certain conclusions of the Court are directly in conflict with the new regulations for preventing collisions at sea as set forth in the official International Rules adopted by the London Safety at Sea Convention, 1960 (see Part C, Page 11; Rule 16, Page 13; Annex, (3) Page 18; Part D, (4) Page 13; Rule 18, Page 13. See also Annex 5(c), 6 and 7, Page 18 of Exhibit "A" attached hereto), this Court is respectfully requested to reconsider the following conclusions in its Opinion:

At Page 666 of 174 F. Supp.:

"Rule 18 provides that when two vessels are meeting end on, or nearly so, each shall alter course to starboard so as to effect a port-to-port passing. (33 U. S. C. 146b.)

"* * * Rule 18, written before the advent of radar as an aid to navigation, specifically refers to instances in which the vessels or their lights are visible to each other. This court can see no reason why its applica-

tion should not extend to a situation in which two vessels 'see' each other by radar."

At Page 668 of 174 F. Supp.:

"The International Rules require that a vessel hearing the fog signal of another vessel, the position of which is not ascertained, shall stop her engines and then navigate with caution until the danger is past. (33 U. S. C. 145n.) The record discloses that neither vessel stopped her engines upon first hearing the fog signal of the other; but at the time, each had the other's position located on her radar screen. The court is of the opinion that 'ascertainment' of a vessel's position by radar is adequate justification for failure to comply with the technical requirement that engines be stopped."

In order that the Court may understand the feeling of the shipping industry that the conclusions of the Court as above set forth are the first judicial holding that the use of radar has altered the application of navigation rules for vessels proceeding in fog and that this Court has, by its decision held (contrary to the international position) that having radar on board relieves a master from strict observation of the International Rules of the Road, particularly those concerning traveling in fog, a copy of the article printed in the New York Times on September 27, 1959 at Page S-17 is attached hereto marked Exhibit "B".

These suggestions for reconsideration are presented to the Court in order that it may have before it the

official International Rules adopted by the London Safety at Sea Convention, 1960 (Exhibit "A") and the interpretation given by the shipping industry of the effect of the conclusions of this Court (Exhibit "B")

Respectfully submitted,

LAURENCE E. DAYTON,

United States Attorney.

/s/ KEITH R. FERGUSON,

Special Assistant to the Attorney
General.

/s/ JOHN F. MEADOWS,

Attorney, Admiralty and Shipping
Section, Department of Justice.

Proctors for Respondent and Cross-
Libelant, United States of America

[Endorsed]: Filed July 12, 1960.

[Title of District Court and Cause.]

ORDER DENYING MOTION FOR REHEARING

This matter coming on to be heard on the motion of respondent and cross-libelant for rehearing; after full argument by the parties, the Court being fully advised in the premises and upon due consideration thereof, it is

Ordered that the Motion for Rehearing be and the same is hereby denied.

Dated this 14th day of July, 1960.

/s/ MICHAEL J. ROCHE,

United States District Judge.

[Endorsed]: Filed July 14, 1960.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To: Weyerhaeuser Steamship Company, Libelant and Cross-Respondent herein, and Messrs. Graham, Jones & Rolph and Henry R. Rolph, Esq., its proctors. To: St. Paul Fire and Marine Insurance Company, Fireman's Fund Insurance Co., and Boston Insurance Company, Intervening Libelants, and Messrs. Derby, Cook, Quinby & Tweedt and Stanley J. Cook, Esq., their proctors.

Please Take Notice, and notice is hereby given that the United States of America, Respondent and Cross-Libelant in the above-entitled cause, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the Final Decree signed by Michael J. Roche, United States District Judge in the above-entitled cause, dated June 17, 1960 and entered in the above-entitled Court on June 20, 1960, and from each and every part of said Decree.

Dated: September 9, 1960.

LAURENCE E. DAYTON,

United States Attorney.

/s/ KEITH R. FERGUSON,

Special Assistant to the Attorney
General.

/s/ JOHN F. MEADOWS,

Attorney, Admiralty and Shipping
Section, Department of Justice.

Proctors for Respondent and
Cross-Libelant, United States of
America.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed Sept. 9, 1960.

[Title of District Court and Cause.]

ORDER EXTENDING TIME FOR FILING RECORD ON APPEAL AND DOCKETING ACTION IN COURT OF APPEALS

This matter coming on to be heard ex parte this day upon motion of respondent and cross-libelant United States of America by its proctors Laurence E. Dayton, United States Attorney and Keith R. Ferguson, Special Assistant to the Attorney General, by Jerry W. Mitchell, Attorney, Admiralty and Shipping Section, Department of Justice, for an order extending the time for the filing of the Record on Appeal and docketing this action in the Court of Appeals to enable the large record in this case to be prepared and filed in the Court of Appeals, and the Court being fully advised in the premises, it is

Ordered that the time for filing the Record on Appeal and docketing the action in the Court of Appeals in this case be and it is hereby extended to ninety days from the first date of the filing of the Notice of Appeal of respondent and cross-libelant United States of America.

Dated this 12th day of October, 1960.

/s/ MICHAEL J. ROCHE,
United States District Judge.

Approved As To Form:

GRAHAM, JAMES & ROLPH.

/s/ By HENRY R. ROLPH,

Proctors for Libelant and Cross-
respondent, Weyerhaeuser
Steamship Company.

DERBY, COOK, QUINBY & TWEEDT,
/s/ By STANLEY J. COOK,
Proctors for Intervening Libelants.

[Endorsed]: Filed Oct. 12, 1960.

[Title of District Court and Cause.]

STATEMENT OF POINTS TO BE RELIED
UPON ON APPEAL

Respondent and Cross-Libelant United States, appellant herein, intends on its appeal in the above-entitled cause to rely on the following points:

I.

The District Court erred in holding that the United States must contribute to the payment of any amount paid to the Government's employee in settlement of the latter's claim against Weyerhaeuser Steamship Company.

II.

The District Court erred in holding that ascertainment of another vessel's position by radar is a sufficient justification for failure to stop engines upon hearing the fog signal of an approaching vessel when navigating under conditions of restricted visibility as required by Rule 16 of the International Rules for Navigation at Sea (33 United States Code 145(n)(b)).

Dated this 5th day of December, 1960.

LAURENCE E. DAYTON,

United States Attorney.

/s/ KEITH R. FERGUSON,

Special Assistant to the Attorney
General.

/s/ JOHN F. MEADOWS,

Attorney, Admiralty and Shipping
Section, Department of Justice.

Proctors for Respondent and
Cross-Libelant, United States
of America.

Receipt of Copy attached.

[Endorsed]: Filed Dec. 6, 1960.

[Title of District Court and Cause.]

DESIGNATION OF RECORD ON APPEAL

To the Clerk of the Above-Entitled Court:

Please include the following on the Record on Appeal:
Docket

Docket
Entries

Numbers

1. Libel in Personam filed July 18, 1956.
14. Answer to Libel filed July 3, 1957.
15. Cross-Libel filed July 3, 1957.

17. Libel in Intervention of St. Paul Fire & Marine Insurance Co. filed July 30, 1957.
20. Answer of United States to Libel in Intervention. filed October 29, 1957.
21. Answer to Cross-Libel filed October 20, 1957.
26. Consent to Amendment of Libel filed April 22, 1958.
41. Stipulation and Order for Amendment to Cross Libel filed October 8, 1958.
42. Further amendment to Cross-Libel filed October 8, 1958.
61. Memorandum Opinion, dated July 2, 1959.
69. Supplement to Opinion, dated July 13, 1959.
73. Stipulation re reasonableness of Weyerhaeuser's settlement with Ostrom filed November 10, 1959.
76. Stipulation re Damages filed May 17, 1960.
79. Findings of Fact and Conclusions of Law on Damages filed June 17, 1960.
80. Final Decree entered June 20, 1960.
82. Motion for Rehearing, no Points & Authorities filed by Government June 27, 1960.
87. Suggestion of Error filed July 12, 1960. (Excluding Exhibits Thereto.)
88. Order Denying Motion for Rehearing entered July 14, 1960.
89. Notice of Appeal by Respondent United States filed September 9, 1960.

91. Order Extending Time for Filing Record on Appeal and Docketing Action in Court of Appeals entered October 12, 1960.

This Designation.

Statement of Points To Be Relied Upon On Appeal, to be filed concurrently with this Designation.

Dated this 5th day of December, 1960.

LAURENCE E. DAYTON,

United States Attorney.

/s/ KEITH R. FERGUSON,

Special Assistant to the Attorney General.

/s/ JOHN F. MEADOWS,

Attorney, Admiralty and Shipping Section,
Department of Justice.

Proctors for Respondent and Cross-Libelant, United States of America.

Receipt of Copy.

[Endorsed]: Filed Dec. 6, 1960.

[Title of District Court and Cause.]

COUNTER DESIGNATION OF RECORD ON
APPEAL SUBMITTED BY WEYERHAEUS-
ER STEAMSHIP COMPANY (LIBELANT,
CROSS-RESPONDENT AND APPELLEE)

To the Clerk of the Above-Entitled Court:

Please include the following in the Record on Appeal in addition to the documents already designated by the United States of America (Respondent, Cross-Libellant and Appellant):

Docket
Numbers

Docket
Entries

27. Ancillary Petition for Injunction and Temporary Restraining Order filed by the United States of America on April 22, 1958.
28. Temporary Restraining Order and Order to Show Cause filed April 22, 1958.
29. Memorandum of Points and Authorities in Support of Ancillary Petition for Injunction and Temporary Restraining Order filed April 24, 1958.
31. Order for Writ of Injunction filed April 28, 1958.
32. Writ of Injunction Served filed April 30, 1960.

This Counter Designation.

It is further requested that the following listed item numbers be included in the record on appeal from the libellant's exhibit which was introduced at the oral argu-

ment of June 1, 1960 at which Judge Michael J. Roche ordered judgment for libelant and against the United States, which exhibit consisted of the certified copy of the Clerk's record in the case of Reynold E. Ostrom, plaintiff, v. Weyerhaeuser Steamship Company, a corporation, from the records of the United States District Court, Western District of Washington, Northern Division, No. 4255.

Item No. 9. Special Appearance of United States of America filed February 14, 1957.

Item No. 11. Order of Court Denying Motion to Bring in Third Party Defendant filed February 20, 1957.

Item No. 33. Motion for Reconsideration of Court's Order Dismissing Third Party Complaint filed March 26, 1958.

Item No. 40. Affidavit of Graydon S. Staring (Attorney in the Admiralty and Shipping Section, Department of Justice, U. S. Attorney's Office, San Francisco, California) filed April 18, 1958.

Item No. 41. Memorandum of the United States of America in Opposition to Defendant's Motion for Reconsideration of Order Denying Leave to Bring in Third Party Defendant filed April 18, 1958.

Item No. 50. Notice of Injunction Against Filing or Prosecution of Third Party Complaint filed April 30, 1958.

Item No. 53. Memorandum of Points and Authorities in Support of Motion to Reconsider filed May 7, 1958.

Item No. 58. Motion for Special Setting filed by

defendant Weyerhaeuser Steamship Company on September 3, 1958.

Item No. 60. Order Staying Setting Case filed September 29, 1958.

Dated: December 15, 1960.

/s/ GRAHAM JAMES ROLPH.

/s/ HENRY R. ROLPH.

Proctors for Weyerhaeuser
Steamship Company.

Receipt of Copy attached.

[Endorsed] Filed Dec. 15, 1960.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO RECORD ON
APPEAL

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, do hereby certify that the foregoing and accompanying documents listed below, are the originals filed in this Court in the above entitled case and that they constitute the record on appeal herein as designated by the Proctors for the Appellant:

Libel

Answer of respondent United States

Cross-Libel of United States

Libel in intervention of St. Paul Fire & Marine Ins.
Co. and Fireman's Fund Insurance Co.

Answer of United States to libel in intervention

Answer of Weyerhaeuser Steamship Co. to cross-
libel of United States

Consent to amendment of libel

Stipulation for amendment to cross-libel

Amendment to cross-libel

Memorandum Opinion

Supplemental Opinion

Stipulation re reasonableness of Weyerhaeuser's settlement with Ostrom

Stipulation re damages

Findings of Fact and Conclusions of Law on Damages

Final Decree

Motion for rehearing

Suggestion of error

Order denying motion for rehearing

Notice of appeal

Order extending time for filing record on appeal

Statement of points to be relied upon on appeal

Designation of Record on appeal

Docket Entries

Libelant's exhibits 1 thru 5, 5A to 5C, and 6 thru 13, inclusive Respondent's exhibits A thru Z and A-A to A-X, inclusive.

— Volumes of Reporter's transcript.

In Witness Whereof, I Have Hereunto Affixed the Seal of the Above Entitled Court This 6th Day of December, 1960.

C. W. CALBREATH, Clerk.

/s/ By WILLIAM C. ROBB,

Deputy Clerk.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO
SUPPLEMENTAL RECORD ON APPEAL.

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, do hereby certify that the foregoing and accompanying documents listed below, are the originals filed in this Court in the above entitled case and that they constitute the supplemental record on appeal as counter-designated by the Proctors for the Appellee:

Memo of Points & Authorities in Support Thereof,
and

Ancillary petition for injunction and temporary restraining order

Temporary restraining order and order to show cause

Order for Writ of Injunction

Writ of Injunction

Counter Designation of record on Appeal

In Witness Whereof, I have Hereunto Affixed the Seal of the Above Entitled Court this 19th Day of December, 1960.

C. W. CALBREATH, Clerk.

/s/ By WM. C. ROBB,
Deputy Clerk.

Received the above this
19th Day of December, 1960.

[Endorsed]: Filed Dec. 19, 1960. Frank H. Schmid.,
U.S.C.A. Clerk.

LIBELANT'S EXHIBIT

[Certified copy of Clerk's Record in the case of Reynold E. Ostrom, Plaintiff, vs. Weyerhaeuser Steamship Co., a corporation, Defendant—United States District Court, Western District of Washington, Northern Division, No. 4255.]

United States District Court Western District
of Washington Northern Division

Civil No. 4255

REYNOLD E. OSTROM,

Plaintiff,

v.

WEYERHAEUSER STEAMSHIP CO., a corporation,

Defendant.

WEYERHAEUSER STEAMSHIP CO., a corporation,

Third Party Plaintiff,

v.

UNITED STATES OF AMERICA,

Third Party Defendant.

SPECIAL APPEARANCE

To: Weyerhaeuser Steamship Co., a corporation, Third Party Plaintiff, and

To: Bogle, Bogle & Gates, its attorneys.

You, And Each Of You, Will Please Take Notice that the United States of America, by and through Charles P. Moriarty, United States Attorney, and Wil-

liam A. Helsell, Assistant United States Attorney, hereby enters its special appearance for the purpose only of contesting the jurisdiction of this Court over the United States of America in this proceeding, and you will please serve all notices, pleadings and papers in connection with said case upon the attorneys for the United States of America at their address below stated.

s/ **CHARLES P. MORIARTY,**
United States Attorney.

s/ **WILLIAM A. HELSELL,**
Assistant United States Attorney.

Office and Post Office address:

1012 U. S. Courthouse,
Seattle 4, Washington.

[Endorsed] : Filed Feb. 14, 1957.

[Title of District Court and Cause.]

**ORDER DENYING MOTION TO BRING IN
THIRD PARTY DEFENDANT**

This Matter having come on regularly for hearing upon the motion of the Weyerhaeuser Steamship Co., a corporation, for leave to make the United States of America a party to this action, the Weyerhaeuser Steamship Co., defendant, appearing through Bogle, Bogle & Gates and Edward S. Franklin its attorneys, and the United States of America appearing specially and objecting to the jurisdiction of the court as to the

United States of America, and the Court having listened to the argument of counsel and having considered the Memorandum of Authorities filed herein and having examined the pleadings and it appearing to the Court that if the defendant and proposed third party plaintiff had sought to institute the cause of action alleged by it in its proposed third party complaint independently in this district against the United States of America, the court would have no jurisdiction over the United States of America and over the objections of the United States of America would be unable to compel the United States of America to submit to the Court's jurisdiction; and it appearing further to the Court that if it would have no jurisdiction to compel the United States of America to respond to a direct action of the type which the defendant and proposed third party plaintiff attempts to assert here, it likewise is without jurisdiction or power to compel the United States to submit to this Court's jurisdiction under the impleader provisions of Rule 14 of the Federal Rules of Civil Procedure, and the Court being fully advised in the premises, now, therefore,

It Is Hereby Ordered that the objections of the United States of America, appearing specially, to this Court's jurisdiction are sustained and the motion of the Weyerhaeuser Steamship Co., defendant, for leave to make the United States of America a party to this action be, and the same is hereby, denied.

Done In Open Court this 20th day of February,
1957.

/s/ JOHN C. BOWEN,
United States District Judge.

Presented and approved by:

/s/ WILLIAM A. HELSELL,
Assistant United States Attorney.

Approved as to form,

Notice of presentation waived.

/s/ BOGLE, BOGLE & GATES.

/s/ By EDW. S. FRANKLIN,
Attorneys for Defendant,
Weyerhaeuser Steamship Co.

[Endorsed]: Filed Feb. 20, 1957.

[Title of District Court and Cause.]

MOTION FOR RECONSIDERATION OF
COURT'S ORDER DISMISSING THIRD
PARTY COMPLAINT

Comes Now defendant Weyerhaeuser Steamship Co.,
a corporation, and moves this Court to reconsider its
prior Order of February 20, 1957, refusing defendant
leave to make the United States of America a third
party defendant herein under Rule 14, Federal Rules
of Civil Procedure, and that said Order be reversed
and leave be given defendant Weyerhaeuser Steamship

Co. to file a third party complaint and/or libel against the United States of America.

This motion is based upon the case of Orion Shipping & Trading Co. v. United States of America, 247 F.(2d) 755, decided by the United States Circuit Court of Appeals on July 25, 1957, the decision in which case authorizes the relief sought by defendant Weyerhaeuser Steamship Co. against the United States of America in this action. Defendant and movant, Weyerhaeuser Steamship Co., a corporation, alleges the Dredge "PACIFIC," which was in collision with the vessel of defendant herein, S.S. "F. E. WEYERHAEUSER," was a public vessel of the United States, and relies upon the Public Vessels' Act, 46 U.S.C. §§781-790, inclusive, and the Suits in Admiralty Act, 46 U.S.C. §§741-752, inclusive.

Defendant further alleges that it maintains an office in Seattle, Washington, and is a resident of this Judicial District under 28 U.S.C.A. 1391 (C).

BOGLE, BOGLE & GATES,

Attorneys for Defendant and

Third Party Plaintiff, Weyerhaeuser
Steamship Co., a corporation.

Receipt of Copy attached.

[Endorsed]: Filed Mar. 26, 1958.

[Title of District Court and Cause.]

AFFIDAVIT OF GRAYDON S. STARING

Graydon S. Staring, being first duly sworn upon his oath, deposes and says:

That he is an Attorney in the Admiralty and Shipping Section of the Department of Justice; that he has read defendant's motion herein erroneously entitled "Motion for Reconsideration of Courts Order Dismissing Third Party Complaint" and supporting papers; that he is familiar with the file and proceedings in this cause and that he is familiar with the file and proceedings in the cause of *Weyerhaeuser Steamship Co. v. United States of America*, Admiralty No. 27359 in the United States District Court for the Northern District of California.

That according to information officially furnished to him the Dredge Pacific is within the territorial waters of the United States and without the Western District of Washington, to wit: in the District of Oregon.

That there has been filed on July 18, 1956, in the United States District Court for the Northern District of California, a certain libel in the case of *Weyerhaeuser Steamship Company v. United States of America*, Admiralty No. 27359 in which *Weyerhaeuser Steamship Company*, the defendant above named, seeks to recover from the United States of America, its damages as a result of the collision with the Dredge

Pacific on September 8, 1955 which is the subject of the proposed Third Party Complaint herein; that the libelant in its said libel has elected to proceed in accordance with the principles of libels in rem; that respondent United States of America in the said Admiralty cause has filed its answer and cross-libel; that the said Admiralty cause is being prepared for trial and that the discovery procedures by the United States in the said Admiralty cause are not yet complete nor even substantially complete.

That even if defendant were allowed to file its Third Party Complaint, despite the lack of jurisdiction and venue of such complaint, the United States would be entitled to 60 days to plead in accordance with the rule and would thereafter require full resort to discovery procedures not only against the defendant but against the plaintiff and would not and could not proceed to trial in May 1958 nor for a considerable period of time thereafter.

/s/ GRAYDON S. STARING.

Subscribed and sworn to before me this 15 day of April 1958.

[Seal]

/s/ J. P. WELSH,

Deputy Clerk, U.S. District Court
Northern District of California.

[Endorsed]: Filed April 18, 1958.

United States District Court Western District of
Washington Northern Division

Civil No. 4255

REYNOLD E. OSTROM,

Plaintiff,

v.

WEYERHAEUSER STEAMSHIP CO., a corporation,

Defendant.

MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION FOR RECONSIDERATION OF ORDER DENYING LEAVE TO BRING IN THIRD PARTY DEFENDANT.

Without any change in the circumstances which required this Court to deny defendant's earlier motion to implead the United States, defendant has now sought to renew that motion on the eve of trial when the impleader sought, even were it within the power of the Court, as it is not, would seriously disrupt not only the conduct of this case but also the conduct of the principal action arising out of this collision now pending in another court.

The United States, appearing specially, opposes the motion to implead it, on the following grounds:

1. The improper venue and lack of jurisdiction which caused the motion originally to be denied;
2. That the controversy sought to be presented is within the exclusive jurisdiction of another Federal court where the collision claims of defendant and the United States are now pending, and that the present

attempt to implead the United States here is an improper attempt to have this Court usurp the jurisdiction of this collision action and render a decision which might then, if favorable to defendant, be asserted as res judicata in the main collision action pending elsewhere; and

3. That the claim that this impleader is timely is not true in fact.

It should be noted here at the outset that, in this improper attempt, counsel for defendant have not only blandly misrepresented the holding in *Orion Shipping & Trading Co. v. United States*, 247 F. 2d 755, although they participated in that case and know better, but also, apparently to throw dust in the eyes of the Court, they have recaptioned their motion as though the United States were already a party and placed a misleading title in their motion calculated to indicate that a third party complaint had been filed herein and then dismissed, which is not true. The apparent purpose of this dissimulation is to foster the false impression that this case is in a similar procedural posture to *Orion*, although that, even if it were true, could not properly be turned to account by defendant in this instance.

In addition to the matters which follow, the United States refers to and incorporates here its memorandum filed in opposition to the original motion to implead made by defendant.

The Venue of the Proposed Third Party Complaint
Is Still Improperly Laid in This District.

Although the proposed third party complaint does not plead facts showing jurisdiction under any statute, it is plain from the character of this Government dredge and from the affidavit of Raymond G. Sandwick on file herein, that she is a public vessel and that the claim of defendant must therefore be brought under the Public Vessels Act, 46 U. S. C., Section 781 et seq.

The venue provisions of the Public Vessels Act, 46 U. S. C., at Section 782, require that though suit be brought in the "district in which the vessel or cargo charged with creating liability is found within the United States," unless the vessel be outside the territorial waters of the United States. Not only does the defendant not plead facts showing venue but, as the affidavits show, the Dredge Pacific is actually within the territorial waters of the United States and within the District of Oregon, not the Western District of Washington. Accordingly, any new suit at this time, if one were permissible at all, would have to be in the District of Oregon. But, moreover, Weyerhaeuser's suit for its collision damages, which included its claim here presented, has already long been in litigation in the Northern District of California where the matter is completely at issue and pending on the libel of Weyerhaeuser and the cross-libel of the United States. It is unthinkable that the Public Vessels Act would permit suits in two districts at once, and the venue provisions of Section 742 show plainly a purpose that venue in this case be laid in only one district.

In the case of Orion Shipping & Trading Co. v. United States, 247 F. 2d 755, 1957 A. M. C. 2236 (9th Cir.), relied on by defendant, the Court of Appeals, far from supporting defendant's position, upheld this Court's ruling that proper venue must be pleaded and proved in third party complaints as in original complaints. There the applicability of the Orion case ends, since in that case there had been a third party complaint on file which had gone to trial and then been dismissed. The Court of Appeals ordered it transferred to the proper venue under the Act. The other three cases cited by defendant in its Supplemental Memorandum filed April 3, 1958 have no application to this case. They do not deal with the venue defect in this case and would not, in any event, stand against the requirement of Orion that proper venue be shown.

The Orion case is not authority to file without regard to venue as defendants seek to do here and then proceed to transfer. What would be the purpose of such a transfer, which would have to be made to the Northern District of California, where the action is already pending? Plainly, the object of defendant must be to thwart the Public Vessels Act and the Orion case in some manner, and it is highly inferable that they hope by some oversight on the part of the Court or opposing counsel, to litigate the collision liability here as an adjunct of this personal injury jury case, in which they would hope to surprise the Government ill-

prepared, and then to assert any ruling of fault as res judicata in the main collision action pending elsewhere.

The Subject Matter of the Proposed Third Party Complaint Is Already Within the Exclusive Jurisdiction of Another Federal Court.

Defendant Weyerhaeuser has already long since filed its suit against the United States for collision damages in the District Court for the Northern District of California. That suit, on in rem and in personam principles under the Public Vessels Act, has been pending since July 18, 1956. The Government has answered the libel and filed its cross-libel and the suit is at present at the discovery stage. All this is shown by the affidavit of Graydon S. Staring filed herein.

In its suit in the Northern District of California, Weyerhaeuser has asked its collision damages. In that suit for collision damages any amount defendant may be held to pay plaintiff here is fully taken into account as an item of damages. *The Albert Dumois*, 177 U. S. 240, 44 L. Ed. 751 (1900); *Brooklyn Eastern District Terminal v. United States*, 54 F. 2d 978, 1932 A.M.C. 108 (2nd Cir.) affirmed 287 U. S. 170. The true subject matter of the proposed third party complaint in the cause of action, if any, of Weyerhaeuser against the United States for collision, of which any award to plaintiff is simply one of the items of damages.

Where, as here, the subject matter is already before another Federal court for determination, though juris-

diction of that court is exclusive, and this court, therefore, may not entertain the proposed third party complaint. *French v. Hay*, 22 Wall. 250, 22 L. ed. 857 (1875); *Ex Parte City Bank of New Orleans*, 3 How. 292, 314, 11 L. Ed. 603, 613 (1845) ("Of course, in whichever court such adverse suit should be first brought, that would give such court full jurisdiction thereof to the exclusion of the other.") The first Federal court obtaining jurisdiction of a controversy should be permitted to proceed without interference. See *Hull v. Burr*, 234 U. S. 712, 725, 58 L. ed. 1557, 1564 (1914). This court's jurisdiction was similarly protected in the case of *United States ex rel Skinner & Eddy v. McCarl*, 8 F. 2d 1011, 1012 (D. C. Cir. 1925) affirmed 275 U. S. 1.

It is apparent that even if defendant's purpose is not to interfere with the pending collision case, the effect of granting defendant's motion to implead would be to do just that. Moreover, since the collision action is already pending and at issue in another court, it is manifest that no constructive purpose would be served by allowing the proposed impleader, the effect of which would simply be a multiplicity of actions on a single cause of action.

It Is Incorrect That the Filing of the Proposed Third Party Complaint Will Not Delay the Case.

In an affidavit of Edwin J. Friedman, filed in apparent support of defendant's motion to implead the

United States, the affiant baldly states that the granting of the motion to implead should not be used as a basis of continuing the trial date and implies that the United States is ready for trial. The true state of affairs is reflected in the affidavit of Graydon S. Staring filed herein. Mr. Friedman, who is a lawyer, must surely know that, under Rule 12, F.R.C.P. the United States would have 60 days merely to answer the proposed third party complaint and would thereafter be entitled under the rules to discovery procedures against both Weyerhaeuser and Ostrom. Manifestly, a very substantial continuance would be required and insisted upon by the United States. Manifestly, also, defendant's motion is untimely.

Conclusion

For the foregoing reasons it is respectfully submitted that defendant's motion for reconsideration should be denied.

/s/ CHARLES P. MORIARTY,
United States Attorney.

/s/ JACOB A. MIKKELBORG,
Assistant United States Attorney.

/s/ KEITH R. FERGUSON,
Special Assistant to the Attorney
General.

Attorneys for United States of
America.

[Endorsed]: Filed April 18, 1958.

[Title of District Court and Cause.]

NOTICE OF INJUNCTION AGAINST FILING
OR PROSECUTION OF THIRD-PARTY
COMPLAINT.

To: Clerk of the Above-Entitled Court.

To: Reynold E. Ostrom, plaintiff, and Levinson &
Friedman, his attorneys, andTo: Weyerhaeuser Steamship Co., defendant, and Bogle,
Bogle & Gates, its attorneys.

You, and Each of You, Will Please Take Notice of the injunction, a certified copy of which is attached hereto, enjoining defendant Weyerhaeuser Steamship Co. from filing or prosecuting any third-party complaint or action against United States of America herein.

/s/ CHARLES P. MORIARTY,
United States Attorney.

/s/ JACOB A. MIKKELBORG,
Assistant United States Attorney.

/s/ KEITH R. FERGUSON,
Special Assistant to the
Attorney General.

LLOYD H. BURKE

United States Attorney

KEITH R. FERGUSON

Special Assistant to the Attorney General

GRAYDON S. STARING

Attorney, Admiralty and Shipping Section

Department of Justice

JOHN F. MEADOWS

Attorney, Admiralty and Shipping Section

Department of Justice

447-A Post Office Building

San Francisco 1, California

Telephone: Market 1-2500

Proctors for United States of America

In the United States District Court
for the Northern District of California,

Southern Division

In Admiralty

No. 27359

WEYERHAEUSER STEAMSHIP COMPANY, a
corporation,

Libelant,

vs.

UNITED STATES OF AMERICA,

Respondent.

UNITED STATES OF AMERICA,

Cross-Libelant,

vs.

The American Steamship F. E. WEYERHAEUSER,
etc., and WEYERHAEUSER STEAMSHIP
COMPANY, a corporation,

Cross-Respondent.

ST. PAUL FIRE & MARINE INSURANCE CO.,
a corporation, and FIREMAN'S FUND INSUR-
ANCE CO., a corporation,

Intervening Libelants.

WRIT OF INJUNCTION

The President of the United States of America, to Weyerhaeuser Steamship Company, a corporation of the State of Delaware having an office and place of business at San Francisco, California, and its agents, successors, deputies, servants, employees, attorneys, proctors, and all persons acting by, through, or under them or any of them and to each and every one of you, Greeting:

Whereas, respondent United States of America has heretofore filed an Ancillary Petition for Injunction and Temporary Restraining Order herein in the United States District Court for the Northern District of California against you and each of you for certain relief as therein set forth and has obtained an order and allowance of a permanent injunction as prayed for in the said Ancillary Petition;

Now, Therefore, we having regard to the matters in the said Ancillary Petition contained, do hereby command and strictly enjoin you, the said Weyerhaeuser Steamship Company, your agents, successors, deputies, servants, employees, attorneys, proctors, and all persons acting by, through, or under them or any of them and each of you to refrain and desist wholly from filing, instituting, or prosecuting any third-party complaint, action, or proceeding whatever against respondent United States of America in that certain action entitled *Ostrom v. Weyerhaeuser Steamship Co.*, Civil No. 4255

in the United States District Court for the Western District of Washington, which commands and injunctions you are respectively required to observe and obey;

And hereof fail not under penalty of law thence ensuing.

Witne s, the Honorable Louis E. Goodman, Judge of said Court, at the City and County of San Francisco, in the Northern District of California, this 28th day of April, 1958.

C. W. CALBREATH,
Clerk.

/s/ By J. P. WELSH,
Deputy Clerk.

A True Copy, Attest

C. W. CALBREATH, Clerk.

By /s/ J. P. WELSH, Deputy Clerk.

[Seal]

[Endorsed]: Filed April 30, 1958.

United States District Court
Western District of Washington
Northern Division

(Civil No. 4255

REYNOLD E. OSTROM,

Plaintiff,

vs.

WEYERHAEUSER STEAMSHIP CO., a corporation,

Defendant,

WEYERHAEUSER STEAMSHIP CO., a corporation,

Third Party Plaintiff,

vs.

UNITED STATES OF AMERICA,

Third Party Defendant.

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO RECONSIDER.

I

Venue for the Proposed Third Party Complaint Does Not Exist to Permit Suit Against the United States in the Western District of Washington.

That the United States Army Dredge PACIFIC is a public vessel of the United States, has not been controverted by the defendant Weyerhaeuser in this Court, nor is it controverted that said public vessel dredge is not now and has not been at any time material to this action within the boundaries of this, the Western District of Washington, nor upon the high seas beyond the boundaries of any other district. As set forth in the affidavit of Jacob A. Mikkelborg, hereto annexed, said public vessel PACIFIC was on April 21, 1958 and prior thereto and until about May 24, 1958, located and will be located at Portland, within the District of Oregon. Status and location of the public vessel PACIFIC is similarly attested by the annexed affidavit of Raymond G. Sandwick, Chief of Plant Branch, Portland District, United States Army Engineers.

Consequently, the impleader and third party complaint brought by the defendant Weyerhaeuser Steam-

ship Co., a corporation, against the United States of America, must fail for lack of compliance with the essential conditions prerequisite to suit against the United States as imposed by the Congress in the Public Vessels Act at Title 46, U. S. C., Section 782. This section, set forth below, specifies with particularity the requirements for venue of a suit against the United States under the Public Vessels Act, which requirements have not been met, thereby precluding a third party suit in this District.

"§ 782 Venue of Suit; application of provisions of Chapter 20. Such suit shall be brought in the district court of the United States for the district in which the vessel or cargo charged with creating the liability is found within the United States, or if such vessel or cargo be outside the territorial waters of the United States, then in the district court of the United States for the district in which the parties so suing, or any of them, reside or have an office for the transaction of business in the United States; or in case none of the parties reside or have an office for the transaction of business in the United States, and such vessel or cargo be outside the territorial waters of the United States, then in any district court of the United States. Such suit shall be subject to and proceed in accordance with the provisions of chapter 20 of this title or any amendment thereof, insofar as the same are not inconsistent herewith, except that no interest shall be allowed on any claim up to the time of rendition of judgment unless upon a contract expressly stipulating for the payment of interest." (Emphasis added.)

Defendant Weyerhaeuser Steamship Co., a corporation, cited to the Court the decision of the Court of Appeals for the Ninth Circuit in *Orion vs. United States*, 247 F. 2d 755. While this decision by the Court of Appeals allowing the mixing of law and admiralty causes reversed the decision of the trial court on jurisdiction for the third party complaint under the Suits in Admiralty Act, at page 757 it affirmed the decision of this Court as to the requirements of proper venue, holding that because the government cargo was not shown to ever have come into the Western District of Washington, venue of the third party action was in the Southern District of New York where Orion had its principal place of business. Thus, venue would not lie within the Western District of Washington. Furthermore, due to the nature of the Army dredge PACIFIC as a public vessel of the United States which requires the third party complaint to be grounded upon the Public Vessels Act, this distinguishes the instant cause from that in *Orion* on the facts. While the latter part of Section 782 of the Public Vessels Act adopts the procedure of the Suits in Admiralty Act, it specifies the entirely distinct provision with respect to venue for Public Vessels Act suits emphasized in the quoted section above.

Thus, the United States respectfully submits for the court's consideration that the Court of Appeals decision in *Orion v. United States* requires rather than prevents a ruling by the Court in favor of the United States to deny the defendant's motion to implead the United States as a third party defendant in the above entitled action, the grounds for said denial necessarily

being the lack of proper venue under the Public Vessels Act.

II

The Subject Matter of the Proposed Third Party Complaint is Already Within the Exclusive Jurisdiction of Another Federal Court.

Suit by the defendant here, Weyerhaeuser Steamship Co., a corporation, has now been pending against the proposed third party defendant United States in the Northern District of California since July 18, 1956. That suit, at issue on libel and cross libel in the cause of the identical collision which gave rise to the instant suit by plaintiff against defendant, has as one of the elements of defendant's damages any amount which defendant may be required to pay plaintiff in the instant suit. That plaintiff's recovery in the instant suit against Weyerhaeuser in this court is simply one of Weyerhaeuser's items of damage sought from the United States in the California suit is a matter of law. *The Albert Dumois*, 177 U.S. 240, 44 L. Ed. 751 (1900); *Brooklyn Eastern District Terminal v. United States*, 54 F. 2d 978, 1932 AMC 108 (2d Cir.) affirmed 287 U.S. 170.

Thus, the subject matter of the proposed third party complaint was already in litigation in the District Court for the Northern District of California. That Court's jurisdiction, first obtained, is exclusive and defendant should not seek to have this Court entertain the proposed third party complaint and this Court should properly permit the California District Court to proceed without color of interference. *French v. Hay*, 22 Wall.

250, 22 L. Ed. 857 (1875); *Ex Parte City Bank of New Orleans*, 3 How. 292, 314, 11 L. Ed. 603, 613 (1845). See also *Hull v. Burr*, 234 U. S. 712, 725, 58 L. Ed. 1557, 1564 (1914). In *United States es rel Skinner & Eddy v. McCarl*, 8 F. 2d 1011, 1012 (D.C. Cir. 1925) affirmed at 275 U. S. 1, this court's prior jurisdiction was similarly protected.

The United States respectfully queries what constructive purpose would be served by allowing the defendant's proposed impleader, permitting the reverse of the purpose of third party practice in creating a multiplicity of actions on the collision liability as between the United States and Weyerhaeuser—which liability is already at issue and pending in another Federal Court.

With these considerations in mind the United States in the District Court for the Northern District of California obtained a temporary restraining order and order to show cause directed to defendant Weyerhaeuser Steamship Co., a corporation, restraining said defendant from proceeding with its proposed third party complaint in this District and to appear and show cause why an injunction should not issue against such proceeding. Significantly, the defendant Weyerhaeuser Steamship Co., a corporation, acceded and is now enjoined from filing, instituting or prosecuting any third party complaint action or proceeding whatever against the United States in the instant cause. Thus, the de-

defendant, Weyerhaeuser Steamship Co., a corporation, does not now oppose this motion for reconsideration of the order entered in this cause on April 21, 1958.

Having set forth the points and authorities in support of the motion to reconsider said Order of April 21, 1958 in this cause, the United States respectfully requests the Court to reconsider and, being more fully advised in the premises, to vacate said order and deny the motion of defendant Weyerhaeuser Steamship Co., a corporation, to bring in the United States as third party defendant in this action between plaintiff Ostrom, and said defendant.

Respectfully submitted,

/s/ CHARLES P. MORIARTY,
United States Attorney.

/s/ KEITH R. FERGUSON,
Special Asst. to the Attorney
General.

/s/ JACOB A. MIKKELBORG,
Assistant United States Attorney.
Attorneys for the United States
of America.

Copy Received:

[Title of District Court and Cause.]

AFFIDAVIT

United States of America Western District of Washington Northern Division—ss.

Jacob A. Mikkelsen, being first duly sworn, on his oath deposes and states that he is an Assistant United States Attorney and is familiar with the files and records in the captioned cause.

That at the time of the defendant's motion to implead the United States as third party defendant, and subsequently on April 21, 1958 at the time of the defendant's motion to reconsider the Court's order of February 20, 1957, and at all times material to commencement of the proposed Third Party action herein, the United States Army Dredge PACIFIC has been and is now a public vessel of the United States, owned on its behalf by the United States Department of the Army and further, according to information officially furnished him, that said vessel was not and is not now within the Western District of Washington nor on the high seas outside of any judicial district.

Further, that there was since July 18, 1956 and now is and at all times material herein there has been pending a certain libel and shortly thereafter a cross libel between the defendant Weyerhaeuser Steamship Co., a corporation, and the United States of America in the District Court for the Northern District of California, on the issues of liability and damages arising out of collision between said United States public vessel, namely, the Department of the Army Dredge PACIFIC and the defendant's vessel SS "F. E. WEYER-

"HAEUSER" on September 8, 1955. The cause of action in the instant case before this Court, between plaintiff Reynold E. Ostrom and defendant Weyerhaeuser Steamship Co., a corporation, also arises from and is an incident of the said collision, the action having been brought as a result of injuries and damages allegedly sustained by plaintiff Ostrom while employed as a crew member on said public vessel, the alleged injuries and damages being claimed to have been incurred as a result of the collision between said public vessel and the defendant's vessel SS "F. E. WEYERHAEUSER".

Because of the pendency of this litigation in California, the United States sought and obtained a temporary restraining order restraining said defendant Weyerhaeuser Steamship Co., a corporation, from bringing suit against the United States in this District by means of impleader and Third Party Complaint against the United States of America. Further, that said temporary restraining order was succeeded by an injunction issued on April 28, 1958 by the Honorable Louis E. Goodman, Judge of the District Court for the Northern District of California at San Francisco, enjoining the defendant, Weyerhaeuser Steamship Co., a corporation, from prosecuting any Third Party Complaint or proceeding against the United States in the instant cause in this Court. Further, your affiant has been advised by Government Admiralty counsel in San Francisco who obtained the restraining order that counsel for defendant Weyerhaeuser Steamship Co., a corporation, in San Francisco, did not contest issuance of said injunction and that defendant Weyerhaeuser is

now enjoined from proceeding with any action against the United States of America in this District by way of third party complaint in the above entitled cause. Said restraining order and injunction are hereby incorporated by reference as though fully set forth and true copies thereof are annexed hereto and made a part of this affidavit, certified copies thereof having been previously filed with this Court.

JACOB A. MIKKELBORG.

Subscribed and Sworn To before me this 7th day of May, 1958.

[Seal]

/s/ J. THORNBURG,

Deputy Clerk,

United States District Court

Western District of Washington

Northern Division.

LLOYD M. BURKE,

United States Attorney.

KEITH R. FERGUSON,

Special Assistant to the Attorney General.

GRAYDON S. STARING,

Attorney, Admiralty and Shipping Section
Department of Justice.

JOHN F. MEADOWS,

Attorney, Admiralty and Shipping Section
Department of Justice,

447-A Post Office Building,

San Francisco 1, California.

Telephone: Market 12500.

Proctors for United States of America.

Weyerhaeuser Steamship Company, et al. 131

In the United States District Court for the Northern
District of California, Southern Division
In Admiralty

No. 27359

WEYERHAEUSER STEAMSHIP COMPANY, a
corporation,

Libelant,

vs.

UNITED STATES OF AMERICA,

Respondent.

UNITED STATES OF AMERICA,

Cross-Libelant,

vs.

The American Steamship F. E. WEYERHAEUSER,
etc., and WEYERHAEUSER STEAMSHIP
COMPANY, a corporation,

Cross-Respondent.

ST. PAUL FIRE & MARINE INSURANCE CO.,
a corporation, and FIREMAN'S FUND INSUR-
ANCE CO., a corporation,

Intervening Libelants.

TEMPORARY RESTRAINING ORDER AND
ORDER TO SHOW CAUSE

Whereas in this cause it has been made to appear
by the verified Ancillary Petition for Injunction and
Temporary Restraining Order filed herein which was
on this 22nd day of April, 1958 presented to the Hon-
orable Louis E. Goodman, Judge of the United States

District Court for the Northern District of California, that a restraining order preliminary to hearing upon the issuance of preliminary injunction should issue, without notice because immediate and irreparable injury, loss or damage will result to the respondent before notice can be served and a hearing had thereon, in that libelant may in the meantime file and serve a third-party complaint upon respondent in that certain action entitled *Ostrom vs. Weyerhaeuser Steamship Co.*, Civil No. 4255 in the United States District Court for the Western District of Washington and make such motions and secure such orders therein as to render ineffective the injunction prayed for herein by making it necessary for respondent herein, in order to protect its interests adequately, to appear and defend the said third-party complaint notwithstanding the exclusive jurisdiction of this Court, and whereas notice and a hearing before entering a temporary restraining order in the present circumstances should not be required inasmuch as the material facts are supported by the record herein, now therefore

It Is Ordered that libelant, its agents, successors, deputies, servants and employees and all persons acting by, come through or under them or any of them or by or through their order, be, and they are hereby, restrained until Monday, April 28, 1958, from filing, instituting, or prosecuting any third-party complaint, action or proceeding whatever against respondent United States of America in that certain action entitled *Ostrom vs. Weyerhaeuser Steamship Co.*, Civil No. 4255, in the United States District Court for the Western District of Washington, and it is

Further Ordered that libelant by its proctors herein be and appear before this Court in the Master Calendar Department thereof Monday, April 28, 1958, then and there to show cause, if any there be, why a preliminary injunction should not be issued further restraining libelants as aforesaid pending the disposition of the present action herein, and it is

Further Ordered that service of this order be made upon libelant by serving the order upon libelant's proctors of record herein or any of them.

Issued at 4 o'clock P.M. this 22nd day of April, 1958.

/s/ LOUIS E. GOODMAN,
United States District Judge.

United States District Court Western District of
Washington Northern Division

Civil No. 4255

REYNOLD E. OSTROM,

Plaintiff,

v.

WEYERHAEUSER STEAMSHIP CO., a corporation,

Defendant.

NOTICE OF INJUNCTION AGAINST FILING
OR PROSECUTION OF THIRD-PARTY
COMPLAINT.

To: Clerk of the Above-Entitled Court.

To: Reynold E. Ostrom, plaintiff, and Levinson & Friedman, his attorneys, and

To: Weyerhaeuser Steamship Co., defendant, and Bogle, Bogle & Gates, its attorneys.

You, and Each of You, Will Please Take Notice of the injunction, a certified copy of which is attached hereto, enjoining defendant Weyerhaeuser Steamship Co., from filing or prosecuting any third-party complaint or action against United States of America herein.

/s/ CHARLES P. MORIARTY,
United States Attorney.

/s/ JACOB A. MIKKELBORG,
Assistant United States Attorney.

/s/ KEITH R. FERGUSON,
Special Assistant to the
Attorney General.

LLOYD H. BURKE,
United States Attorney.

KEITH R. FERGUSON,
Special Assistant to the Attorney General.

GRAYDON S. STARING,
Attorney, Admiralty and Shipping Section
Department of Justice.

JOHN F. MEADOWS
Attorney, Admiralty and Shipping Section,
Department of Justice,

447-A Post Office Building,
San Francisco 1, California.
Telephone: Market 1-2500.

Proctors for United States of America.

In the United States District Court for the Northern
District of California, Southern Division

In Admiralty

No. 27359

WEYERHAEUSER STEAMSHIP COMPANY, a
corporation,

Libelant,

vs.

UNITED STATES OF AMERICA,

Respondent.

UNITED STATES OF AMERICA,

Cross-Libelant,

vs.

The American Steamship F. E. WEYERHAEUSER,
etc., and WEYERHAEUSER STEAMSHIP
COMPANY, a corporation,

Cross-Respondent.

ST. PAUL FIRE & MARINE INSURANCE CO., a
corporation, and FIREMAN'S FUND INSUR-
ANCE CO., a corporation,

Intervening Libelants.

WRIT OF INJUNCTION

The President of the United States of America, to
Weyerhaeuser Steamship Company, a corporation of the
State of Delaware having an office and place of busi-
ness at San Francisco, California, and its agents, suc-

cessors, deputies, servants, employees, attorneys, proctors, and all persons acting by, through, or under them or any of them and to each and every one of you,
Greeting

Whereas, respondent United States of America has heretofore filed an Ancillary Petition for Injunction and Temporary Restraining Order herein in the United District Court for the Northern District of California against you and each of you for certain relief as therein set forth and has obtained an order and allowance of a permanent injunction as prayed for in the said Ancillary Petition;

Now, Therefore, we having regard to the matters in the said Ancillary Petition contained, do hereby command and strictly enjoin you, the said Weyerhaeuser Steamship Company, your agents, successors, deputies, servants, employees, attorneys, proctors, and all persons acting by, through, or under them or any of them and each of you to refrain and desist wholly from filing, instituting, or prosecuting any third-party complaint, actions, or proceeding whatever against respondent United States of America in that certain action entitled *Ostrom v. Weyerhaeuser Steamship Co.*, Civil No. 4255 in the United States District Court for the Western District of Washington, which commands and injunctions you are respectively required to observe and obey;

And hereof fail not under penalty of law thence ensuing.

Witness, the Honorable Louis E. Goodman, Judge of said Court, at the City and County of San Francisco, in

the Northern District of California, this 28th day of April, 1958.

C. W. CALBREATH,
Clerk.

/s/ By ~~J. P. WELSH~~,
Deputy Clerk.

A True Copy, Attest

C. W. CALBREATH, Clerk.

By /s/ J. P. WELSH Deputy Clerk.

[Seal]

United States District Court
Western District of Washington
Northern Division
Civil No. 4255

REYNOLD E. OSTROM,

Plaintiff,

v.

WEYERHAEUSER STEAMSHIP CO., a corpora-
tion,

Defendant,

WEYERHAEUSER STEAMSHIP CO., a corpora-
tion,

Third Party Plaintiff,

v.

UNITED STATES OF AMERICA,

Third Party Defendant.

AFFIDAVIT OF RAYMOND G. SANDWICK

Raymond G. Sandwick, being first duly sworn upon his oath, deposes and says:

That he is the Chief of the Plant Branch of the Portland District of the United States Army Engineers and in that capacity is familiar with the status, location, and operations of the United States Army Dredge Pacific.

That the United States Army Dredge Pacific is owned and operated by the United States as a public vessel, is not registered, enrolled or certificated as a merchant vessel and does not operate for hire, profit, or otherwise as a merchant vessel.

That the United States Army Dredge Pacific is presently in dry dock at Swan Island, Portland, in the State of Oregon for major repairs and overhaul, the estimated date of completion of which is about May 24, 1958.

/s/ RAYMOND G. SANDWICK.

County of Multnomah State of Oregon—ss.

Subscribed and sworn to before me this 8 day of April, 1958.

[Seal]

/s/ CLIFFORD C. COMISKY,

My Commission expires Nov. 8, 1960.

I hereby certify that the annexed instrument is a true and correct copy of the original on file in my office.

Attest: JOHN A. BURNS

Clerk, U. S. District Court Western District of Washington.

/s/ By J. THORNBURGH,

Deputy Clerk.

[Endorsed]: Filed May 7, 1958.

United States District Court
Western District of Washington
Northern Division
Civil No. 4255.

REYNOLD E. OSTROM,

Plaintiff,

vs.

WEYERHAEUSER STEAMSHIP CO., a corporation,

Defendant.

MOTION FOR SPECIAL SETTING

Comes Now defendant Weyerhaeuser Steamship Co., a corporation, and moves the Court for an immediate trial setting of the above entitled case.

This motion is based upon the records and files of said cause and the attached affidavit of Edward S. Franklin of the attorneys for defendant Weyerhaeuser Steamship Co., a corporation.

/s/ BOGLE, BOGLE & GATES,

Attorneys for Defendant.

United States of America, State of Washington,
County of King—ss.

Edward S. Franklin, being first duly sworn, on oath deposes and says:

That he is one of the attorneys for defendant Weyerhaeuser Steamship Co., a corporation, and makes this affidavit in support of defendant's motion for an immediate setting for trial of the above-entitled action;

This action was filed in the Superior Court of King County, Washington, under the Jones Act on October 11, 1956, and was thereupon removed to the United States District Court by petition filed October 30, 1956; that defendant served and filed its answer herein on November 13, 1956, and said cause has been continuously at issue since said time;

That thereafter defendant sought to implead the United States of America as a third party defendant which motion was denied by this Court on November 20, 1957; that defendant thereafter moved the Court for reconsideration of its order on defendant's motion for joining the United States of America as an additional party defendant which culminated in the United States of America obtaining and entering in the United States District Court at San Francisco, California, an order restraining defendant from proceeding to implead the United States of America in this action, and the United States of America is not a proper party to the trial of this case;

That this case was originally set for trial on February 25, 1958; and was thereafter continued to May 20, 1958, and was then stricken from the trial calendar by order of this Court on May 15, 1958;

That on August 18, 1958, at the monthly assignment calendar of this Court, defendant moved for an immediate trial setting of this case but the action was not assigned for trial;

That the interest of justice requires this case be adjudicated within the immediate future and the liability, if any, of Weyerhaeuser Steamship Co., a corporation,

defendant herein, be determined for the reason that the principal action involving the United States of America and Weyerhaeuser Steamship Co. involving the collision of the Dredge PACIFIC and the S. S. F. E. WEYERHAEUSER will be tried in San Francisco, California, in November, 1958.

/s/ EDW. S. FRANKLIN.

Subscribed and Sworn To-before me this 3rd day of September, 1958.

/s/ RONALD E. McKRISTEY,

Notary Public in and for the State of
Washington, residing at Seattle.

[Endorsed]: Filed Sept. 3, 1958.

[Title of District Court and Cause.]

ORDER STAYING SETTING OF CASE

This matter coming on to be heard by agreement of the parties, at 1:30 P. M. September 11, 1958 on the motion of defendant, Weyerhaeuser Steamship Company for an immediate setting of the above case for trial; and the plaintiff being represented by his attorneys, Levinson & Friedman, Mr. Sam L. Levinson appearing in the matter, and the defendant being represented by its attorneys, Bogle, Bogle & Gates, Mr. Edw. S. Franklin appearing in the matter; thereupon the Court, on its own motion, requested the office of the United States District Attorney to be represented at said hearing, although not a party to this litigation, and Mr.

Jacob A. Mikkeltorg, Assistant United States District Attorney, appeared in response to such request; and

It Appearing to the Court that the above entitled action is a personal injury action arising from a collision occurring off Coos Bay, Oregon, on September 8, 1955 between the United States Dredge PACIFIC and the Steamship F. E. WEYERHAEUSER, owned and operated by defendant, wherein plaintiff, a crew member of the United States Dredge PACIFIC, alleges his injuries were due to the negligent navigation of the steamship F. E. WEYERHAEUSER, which [illegible] denied and affirmatively asserted that the collision was solely due to the negligence of the United States in the navigation of the Dredge PACIFIC; and

It Further Appearing to the Court that an admiralty action is presently pending in the United States District Court in San Francisco, California between the United States of America and Weyerhaeuser Steamship Company arising from said collision, in which the legal liabilities of the parties for said collision will be finally determined; and

It Further Appearing to the Court that a trial and judgment of the above entitled action prior to the trial of the collision action in San Francisco would not be in the interest of orderly litigation; Now Therefore, it is hereby

Ordered that the setting of the above entitled case for trial be stayed pending the trial and entry of judgment in the pending collision action in the United States District Court in San Francisco, California, in

the pending action in which the United States of America, and Weyerhaeuser Steamship Company are parties thereto; to which order defendant excepts and its exception is hereby allowed.

Done In Open Court this 29th day of September, 1958

/s/ JOHN C. BOWEN,

United States District Judge.

Approved:

/s/ SAM L. LEVINSON,

Attorneys for Plaintiff.

Presented by:

/s/ EDW. S. FRANKLIN,

of Bogle, Bogle & Gates,

Attorneys for Defendant.

[Endorsed]: Filed Sept. 29, 1958.

[Endorsed]: No. 17187. United States Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. Weyerhaeuser Steamship Company and St. Paul Fire & Marine Insurance Co. and Fireman's Fund Insurance Co., Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed and Docketed: December 6, 1960.

/s/ FRANK H. SCHMID,

Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
For the Ninth Circuit

No. 17187.

UNITED STATES OF AMERICA,

Appellant,

vs.

WEYERHAEUSER STEAMSHIP COMPANY, a
corporation, ST. PAUL FIRE & MARINE IN-
SURANCE CO., a corporation, FIREMAN'S
FUND INSURANCE CO., a corporation, and
BOSTON INSURANCE COMPANY, a corpora-
tion,

Appellees.

CONCISE STATEMENT OF THE POINTS ON
WHICH APPELLANT UNITED STATES OF
AMERICA INTENDS TO RELY [Rule 17(6)]
AND DESIGNATION OF CONTENTS OF
RECORD ON APPEAL.

Comes now Appellant, United States of America, and
hereby and herewith incorporates as its concise statement
of the points on which Appellant United States of
America intends to rely [Rule 17(6)] and designation
of parts of the record material to the consideration of
the appeal and to be printed the contents of the Designa-
tion of Record on Appeal and Statement of Points to
be Relied Upon on Appeal heretofore filed by Appel-
lant in the United States District Court for the
Northern District of California, Southern Division and

transmitted by the Clerk of said Court to the Clerk of the United States of Appeals for the Ninth Circuit, with the additional designation in the record of this statement as material to the consideration of the appeal and for printing.

GEORGE COCHRAN DOUB,
Assitant Attorney General.

LAURENCE E. DAYTON,
United States Attorney.

MORTON HOLLANDER,

JOHN G. LAUGHLIN,

W. HAROLD BIGHAM,

LEAVENWORTH COLBY,

KEITH R. FERGUSON,

Attorneys, Department of Justice.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed Dec. 16, 1960. Frank H. Schmid,
Clerk.

[Title of Court of Appeals and Cause.]

CONCISE STATEMENT OF THE POINTS
ON WHICH APPELLEE WEYERHAEUSE
STEAMSHIP COMPANY INTENDS TO RE-
LY [Rule 17(6)] AND DESIGNATION OF
CONTENTS OF RECORD ON APPEAL.

Comes now Appellee, Weyerhaeuser Steamship Company, and hereby and herewith incorporates as its concise statement of the points on which Appellee Weyerhaeuser Steamship Company intends to rely [Rule 17(6)] and designation of parts of the record material to the consideration of the appeal and to be printed the contents of the Counter Designation of Record on Appeal submitted by Weyerhaeuser Steamship Company heretofore filed by Appellee in the United States District Court for the Northern District of California, Southern Division and transmitted by the Clerk of said Court to the Clerk of the United States Court of Appeals for the Ninth Circuit, with the additional designation in the record of this statement as material to the consideration of the appeal and for printing.

/s/ GRAHAM JAMES & ROLPH,

/s/ By HENRY R. ROLPH,

Proctors for Appellee, Weyerhaeuser
Steamship Company.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed Dec. 23, 1960. Frank H. Schmid,
Clerk.

[Title of Court of Appeals and Cause.]

STIPULATION AND ORDER

It Is Hereby Stipulated by and between the parties hereto that Exhibit A of "Respondent and Cross-Libelant's Suggestion of Error in the Opinion of this Court [U. S. Dist. Court] in its Application of Radar Location as 'Visible' and 'Ascertainment' Within the Meaning of Rules 18 and 16 of the International Rules of the Road", because of its voluminous nature and in order to economize in the cost of the printed record, may be omitted from the printed record on appeal and considered by the Court in its original form and that three copies of Exhibit A shall be presented forthwith by Appellant to the Court.

GRAHAM JAMES & ROLPH,

/s/ By **HENRY R. ROLPH,**

Proctors for Appellee,

Weyerhaeuser Steamship Company

WILLIAM H. ORRICK, JR.

Assistant Attorney General.

LAURENCE E. DAYTON,

United States Attorney.

MORTON HOLLANDER,

JOHN G. LAUGHLIN,

W. HAROLD BIGHAM,

LEAVENWORTH COLBY,

/s/ By **KEITH R. FERGUSON,**

Attorneys, Department of Justice.

So Ordered This 23rd day of February, 1961.

RICHARD H. CHAMBERS,

United States Circuit Judge.

[Endorsed]: Filed Feb. 27, 1961. Frank H. Schmid,
Clerk.

[fol. 148]

IN UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Minute entry of argument and submission—August 1, 1961 (omitted in printing).

[fol. 149]

IN UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Before: Chambers, Barnes and Hamley, Circuit Judges.

MINUTE ENTRY OF ORDER DIRECTING FILING OF OPINION AND
FILING AND RECORDING OF JUDGMENT—August 30, 1961.

Ordered that the typewritten opinion this day rendered by this Court in above cause be forthwith filed by the clerk, and that a judgment be filed and recorded in the minutes of this court in accordance with the opinion rendered.

[fol. 150]

IN UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 17,187

UNITED STATES OF AMERICA, Appellant,

vs.

WEYERHAEUSER STEAMSHIP COMPANY, Appellee.

On Appeal from the United States District Court for the
Northern District of California, Southern Division.

OPINION—August 30, 1961

Before: Chambers, Barnes and Hamley, Circuit Judges.

BARNES, Circuit Judge:

This case arises in admiralty upon a libel against the United States, and a cross-libel filed by the United States. The district court thus had jurisdiction under 28 U.S.C. §§ 1345 and 1346, and 46 U.S.C. § 782. A final decree was entered below, and this court has jurisdiction under 28 U.S.C. § 1291.

On September 8, 1955, appellee's vessel, the S.S. F. E. WEYERHAEUSER, collided with appellant's vessel, the United States Army dredge PACIFIC, off the coast of Oregon. The trial court found that both parties were at fault and this finding is not challenged here. The accident caused significant damage to both vessels, and resulted in personal injury. Reynold Ostrom, an employee of the United States serving on the PACIFIC, recovered compensation from the United States in the amount of \$329.01 under the Federal Employees' Compensation Act (5 U.S.C. §§ 751, *et seq.*). Ostrom also recovered \$16,000 from appellee by settlement. St. Paul Fire & Marine Insurance Company intervened claiming \$19,122.75 as damages under its [fol. 151] policy of marine insurance for its cargo general average contribution arising out of the collision, and Fireman's Fund Insurance Company likewise intervened, claiming \$923.85 for its marine insurance cargo general average contribution. The court found (Finding II, Tr. 72) the intervenors had made such general average payments, and also found in favor of intervenor Boston Insurance Company in the sum of \$443.54, on the same basis, or a total general average recovery of \$20,490.14.

In accordance with its finding of mutual fault the trial court divided the damages between the parties as required by maritime law. It found that each party suffered damages as follows:

Weyerhaeuser Steamship Company:

\$27,652.13	physical and detention damages of the S.S. F. E. WEYERHAEUSER
16,000.00	paid to Ostrom in settlement of suit against it.

\$43,652.13 Total provable damages.

United States of America:

\$16,949.12 physical and detention damages of the
PACIFIC

20,490.14 payable to intervening libelants
(insurance)

\$37,439.26 Total provable damages

(Findings of Fact IV, R. p. 74.) Since appellee's provable damages exceeded appellant's damages by \$6,212.87, the court awarded appellee judgment in the sum of \$3,106.44, plus interest. Appellant, claiming that the court erred in including the \$16,000 personal injury award in appellee's provable costs, has taken this appeal.

Appellant does not deny the antiquity or propriety of the maritime rule requiring the apportionment of damages in cases of mutual fault. Appellant also does not deny that in most instances the apportionment rule applies to damages occasioned by personal injuries. Appellant does contend, however, that the apportionment rule does not apply to damages arising from an injury to any employee covered by the Federal Employees' Compensation Act. Under 5 U.S.C. § 757(b), the liability of the United States, under the Act, with respect to the injury or death of an employee [fol. 152] is "exclusive and in place of all other liability of the United States . . . to the employee . . . and anyone otherwise entitled to recover damages from the United States . . . on account of such injury or death . . ." This statute on its face, then, does seem to save the United States harmless from any liability from injury to its employees other than that specified by the statute. The government points out that statutes such as these are "give and take" arrangements. The employer loses his defenses to the employee's action and the employee gets a remedy which is fast and certain. The employer, on the other hand, enjoys a liability which is limited and determinative. To permit recoveries beyond that specifically allowed by the Act would be subversive of the statutory scheme. This is so, appellant contends, even with respect to recoveries by third parties—what cannot be accomplished directly

should not be permitted by the indirect means of a third party recovery.

That the Federal Employees' Compensation Act provides the sole remedy for injured employees of the United States is well established. That was the only question before the Supreme Court in *Patterson v. United States*, 1959, 359 U.S. 495. And it affirmed *Johansen v. United States*, 1952, 343 U.S. 427, 441, which states: The United States "has established by the Compensation Act a method of redress for its employees. There is no reason to have two systems of redress." (343 U.S. at 439.)¹

¹ And see: *Lewis v. United States*, D.C. Cir. 1951, 190 F.2d 22; *Sasse v. United States*, 7 Cir. 1953, 201 F.2d 871; *Smithers & Company Inc. v. Coles*, D.C. Cir. 1957, 242 F.2d 220, cert. denied 354 U.S. 914; *Underwood v. United States*, 10 Cir. 1953, 207 F.2d 862.

Earlier this year, when this court considered the exclusiveness of an injured person's remedy under the Federal Employees' Compensation Act (46 U.S.C. § 751, *et seq.*) vis-a-vis the Federal Tort Claim Act (28 U.S.C. § 1346(b)), this court said:

"The language of §§ 751(a) and 757(b) of the Federal Employees' Compensation Act . . . is plain and unambiguous. Under the statute the employee, regardless of any negligence, is to receive in case of injury certain definite amounts, which recovery shall be exclusive, and in place, of all other liability of the United States.' His recovery is not dependent upon the injury being caused by the negligence of any employees of the United States nor is it reduced or taken from him if the injury is the result of his own negligence. That the remedy provided by the Federal Employees' Compensation Act is to be exclusive is shown by the legislative history of Congress at the time that the statute was amended in 1949. The House Committee Report contains the following:

'It is the committee's purpose to have the language of such Section 7 entirely clear in this respect so as to express the intention that the compensation remedy shall henceforth be the exclusive remedy of a person protected by this act against the United States, or against its instrumentalities in cases in which a suable instrumentality is the employer.'

Similarly, the Senate Report states:

'The purpose of the latter is to make it clear that the right to compensation benefits under the act is exclusive and in place of any and all other legal liability of the United States or its instrumentalities of the kind which can be enforced by original proceeding whether administrative or judicial, in a civil action or in admiralty or by any

[fol. 153] In furtherance of this policy it has been held that a joint tortfeasor may not seek contribution or indemnity from the United States when the joint tortfeasor is sued by the administrator of a deceased United States employee (*Christie v. Powder Power Tool Corp.*, D.D.C. 1954, 124 F.Supp. 693). Appellee contends, however, that this case cannot control here, for it does not deal with the admiralty rule requiring apportionment of damages. Appellee points out that the trial court did not award it any sum as compensation for the injury suffered by Ostrom. Rather the award reflects the damage which appellee suffered as a result of the collision when it was required to compensate Ostrom for his injuries. In other words, appellee sought and received recovery in its own right for appellant's breach of duty to it under the maritime law; appellee claims that its right is not derivative from any right which Ostrom may have had.

The question presented here is a difficult one. Its resolution will abridge either the statutory policy or the maritime law. To allow a third party recovery against the United States on any ground is subversive of the statute limiting the liability of the United States. On the other hand, the money paid to Ostrom is an element of the total damages [fol. 154] suffered by appellee. And failure to apportion such damages is a breach of the maritime rule—for the rule requires the apportionment of all damages suffered, without regard to the fact that some of those damages stem from liabilities which could not be imposed against one of the parties but for the apportionment. (*The Chatta-hoochee*, 1899, 173 U.S. 540.) There appear to be no cases which can be described as controlling, but there are some precedents which may be helpful.

With the first portion of our last statement appellee would not agree. It refers us to *United States v. The S. S.*

proceeding under any other workmen's compensation law or under any Federal tort liability statute.'

It thus appears that neither the plain language of the statute, its legislative history, nor the prior construction of similar statutes permits a recovery by appellant." (*Posegate v. United States*, 1961, 288 F.2d 11 at 14.)

Washington, E.D.Va. 1959, 172 F.Supp. 905, and *Texas Co. v. United States*, 4 Cir., 1959, affirmed without opinion 272 F.2d 711 (no petition for writ of certiorari filed).

It is true that Judge Bryan in the *Washington-Ruchamkin* case, *supra*, did grant Texas Company, the private shipowner, judgment against the United States (for one-half of the awards made against the Texas Company in favor of the heirs of four soldiers killed aboard the government vessel in the collision)—and also ordered such judgment without deduction for the veterans benefits already paid by the government to the soldiers' heirs. We point out two things. First: the *Washington-Ruchamkin* case was, unlike this present action, brought under the Death on the High Seas Act, 46 U.S.C. § 761. This action was brought under 46 U.S.C. §§ 781-790, the Public Vessels Act. Yet both Acts must be construed together in laying down the pattern and marking the restrictions under which the United States may be sued. *Mejia v. United States*, 5 Cir. 1945, 152 F.2d 686, *cert. denied* 328 U.S. 862; *United States v. Caffey*, 2 Cir. 1944, 141 F.2d 69. Secondly: (and of greater importance) Judge Bryan listed four issues before him; after the fourth circuit had held "The Texas Company also at fault." The first three do not concern us here; the fourth assumes as *admitted* the very legal question here in issue.² We do not know why this admission was made by the government in the *Washington* case. But no such admission was made in the instant case. And, of course, the government is not estopped from taking a position here contrary to that it has invariably or occasionally taken previously. *Utah Power & Light v. United States*, 1917, 243 U.S. 389, 409; *United States v. City and County of San Francisco*, 1941, 310 U.S. 16, 32.

² The opinion raises as the fourth question before the court:

"(d) whether against the *admitted* right of The Texas Company to reimbursement from the government for one-half of the death awards as collision damages, the United States may offset the sums paid and payable by the government to the decedents' dependents as statutory death gratuities, indemnity, and compensation." (Emphasis added.) 172 F.Supp. 905 at 907.

Appellee concludes its references to the *Washington* case in its brief with the following appeal to the court's conscience:

"The fact is that the United States with knowledge of the admiralty mutual fault collision rule enacted a scheme of compensation for its employees injured in the performance of duty without reference to negligence. Insofar as Weyerhaeuser is concerned the employee's compensation has nothing to do with this collision and should have no bearing on Weyerhaeuser's right to have all the damages resulting from the collision mutually apportioned between the two vessels. Any other result would be grossly unfair."

Whether fair or unfair, the Supreme Court has established the rule that the United States cannot be burdened *directly* with tort liability for injuries sustained by its employees. We do not presume that if there had never been a retreat by the United States from its absolute non-liability as a sovereign, appellee could or would here maintain that such claim of sovereignty was inferior to the right established by admiralty law, no matter how ancient, simply because unfair to the shipowner. Any claim of sovereign immunity is to some extent always unfair to the one who has sustained loss or damage.

But can a limited waiver of sovereign immunity be enlarged by indirection, *i.e.*, through the negligent act of a third party—the shipowner? We think not.

There has been no question for one hundred years as to the general maritime rule that a total loss in collision cases is divided where both vessels are at fault. *The Catherine*, 1954, 58 U.S. 171, 177; *Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp.*, 1952, 342 U.S. 282. And appellee cites to us as examples where damages *have been allowed* against the government two cases: *The City of Rome*, 2 Cir. 1930, 38 F.2d 782, 786; *Chicago-Silverpalm*, 9 Cir. 1937, 94 F.2d 771.

[fol. 156] *The City of Rome* concerned itself only with an attempt to exempt or limit liability by Ocean Steamship Company (as the owner of *The City of Rome*) from the

claims of Goldye M. Dobson, as Administratrix, against it; and its claim for damages against The United States for property damages. Judge Learned Hand specifically avoided any "question of marshalling the proceeds of the Rome as between the United States and the private claimants."

Further, this case was decided in 1930. Title 5 U.S.C. § 757(b) (the exclusive liability subsection) was created by the Act of October 14, 1949, Sec. 303(g). It was given but a limited retroactive effect. (See U.S.Code, 1952 Ed., Title 1-14, p. 371.)

Chicago-Silverpalm, supra, is cited to us as 94 F.2d 771. *The Silver Palm* appears in 94 F.2d 754, and holds the United States at mutual fault with the private shipowner for a collision. It does not touch upon the matter here involved. *The Silver Palm (Silver Line v. United States)*, 9 Cir. 1937, 94 F.2d 776, has solely to do with limitation of liability on the Silver Palm's part. In *The Silver Palm (Silver Line v. United States)*, 9 Cir. 1937, 94 F.2d 781, the appeal was from an order permitting the administrators of three deceased naval officers to proceed with their wrongful death suits. The appeal was dismissed as moot. Neither *The Silver Palm* cases, nor *The Rome* case, establish the principle claimed by appellee that "similar damages have been uniformly allowed in previous cases against the government." (Appellee's Brief, p. 10.) Nor do alleged voluntary settlements by the government establish a right specifically excluded and prohibited by an Act of Congress, as is argued in appellant's brief. However, there is authority to support the appellee's position. In *The Tampico case* (W.D.N.Y. 1942, 45 F.Supp. 174), a stevedore was injured while transferring cargo from a barge to *The Tampico*. The stevedore, who was employed by *The Tampico's* owner, sued the barge owner claiming that the barge was defective. The barge owner impleaded the owner of *The Tampico*, claiming that it was negligent in operating a "clamshell bucket" used in transferring cargo. *The Tampico's* owner was immune from personal injury suits by its employees, for it was covered by the Longshoremen's and Harbor Workers' Compensation Act, 38 U.S.C. §§ 901,

et seq. The "exclusiveness of liability" under this Act, 33 [fol. 157] U.S.C. § 905, is similar in extent to 5 U.S.C. § 757(c). Nevertheless, the trial court held that the barge owner could obtain contribution from the owner of The Tampico. The Tampico's owner was immune from suits brought by the stevedore or anyone in his right, but "the right in admiralty to contribution between wrongdoers does not stand on subrogation but arises directly from the tort." We must note, of course, that this is a district court case, not binding on this court, and of limited precedential value.

The Tampico was cited and quoted with approval by a higher court in *Hittaffer v. Argonne Co.*, D.C.Cir. 1950, 183 F.2d 811, *cert. denied* 340 U.S. 852. In that case appellant's husband was injured during the course of his employment; his employer, as in *The Tampico*, was covered by the Longshoremen's and Harbor Workers' Compensation Act. The wife claimed that the injury to her husband had interfered with her marital relationship and she sued for loss of consortium. The court held that the action for loss of consortium does not stand on subrogation but arises directly from the tort. Thus the wife was not suing in her husband's right; she was suing in her own right and was entitled to damages for her loss. Accordingly, the court held that the wife's right to damages for loss of consortium was not barred by the Compensation Act. This case, however, was expressly overruled in 1957 in *Smithers & Company Inc. v. Coles*, D.C.Cir., 242 F.2d 220, *cert. denied* 354 U.S. 914, a case heard by the District of Columbia Circuit en banc. The court noted that the right to damages for loss of consortium must be regarded as a right "flowing from" the spouse's injury:

"Whether the right of a spouse be regarded as independent, i.e., arising directly from the tort, or as derivative, that right does not come into existence except for the occurrence of the injury. Absent a compensable injury to the one spouse there would be no claim to assert against the employer." (242 F.2d at 224-225.)

Expressing its disagreement with *Hittaffer*, the court in *Smithers & Company Inc. v. Coles* held that all liability

"flowing from" the employee's injury is governed by the Act:

"In the *Hitafter* opinion this court conceded that the 'plain and literal language' of this statute *could* be construed to bar 'any right of action flowing from the [fol. 158] compensable injury,' but rejected that interpretation. We think the statute cannot be read any other way without doing extreme violence to those 'plain and literal' words read in the light of the purposes of the Act." (242 F.2d at 224.)

The same result had already been reached by the tenth circuit with respect to the Federal Employees' Compensation Act, the statute which is in issue here (*Underwood v. United States*, 10 Cir. 1953, 207 F.2d 862).³ The *Underwood* case received the approbation of this court in *Thol v. United States*, 9 Cir. 1954, 218 F.2d 12, 14. The *Smithers & Company Inc. v. Coles* and *Underwood* cases are, we think, persuasive authority here.⁴ In our opinion the shipowner's right of action is just as dependent upon the employee's injury as the wife's claim for loss of consortium; or to put it more precisely, the shipowner's claim is no more independent of the employee's injury than is the wife's. If, then, the policy of the statute bars the wife's action for loss of consortium, it should also bar the shipowner's action for contribution.

³ We agree with the reasoning of the tenth circuit. There the court said:

"It is significant, we think, that the Congress chose to speak in terms of liability of the government, not in terms of remedies or rights of action, and in doing so, it gave a right of action only to the extent that it saw fit to relax governmental immunity from any liability." *Underwood v. United States*, 10 Cir., 1953, 207 F.2d 862, 864.

⁴ As the District of Columbia Circuit pointed out in *Smithers*: "[E]very court which had undertaken to construe the same or similar exclusionary clauses prior to the *Hitafter* case had arrived at a result in conflict with the decision of this court in *Hitafter*. [cases noted] Cases decided subsequent to the *Hitafter* case also followed the literal language of statutes cast in substantially the same terms." 242 F.2d 220 at 225.

The authority supporting appellee's position is not so persuasive as the cases last cited above. While *The Tampico* supports appellee's cause, it was, in the eyes of one court overruled by *American Mut. Liability Ins. Co. v. Matthews*, 2 Cir. 1950, 182 F.2d 322. (See *Coates v. Potomac Elec. Power Co.*, D.D.C. 1951, 95 F.Supp. 779.) For this reason, appellee did not cite *The Tampico*. We cannot agree that the *Matthews* case overrules *The Tampico*. *Matthews* held only that the Longshoremen's and [fol. 159] Harbor Workers' Compensation Act prevents the joint tortfeasor from obtaining contribution from the employer covered by the Act. This parallels the holding, under the Federal Employees' Compensation Act, in *Christie v. Powder Power Tool Corp.*, *supra*. It does not deal with the problem presented by the admiralty rule and the point raised by *The Tampico*, viz. that the suit based upon the admiralty rule is an independent cause of action not founded upon the injured employee's right but founded upon the employer's breach of a duty to other shipowners to exercise care in navigation. This point is involved, however, in the persuasive authority discussed above relating to a spouse's right to sue for loss of consortium. Thus, while it does not appear that *The Tampico* has been overruled, it has been robbed of its persuasiveness by subsequent developments.

Appellee places its principal reliance upon a series of cases interpreting the Harter Act, the most emphasis being placed on *The Chattahoochee*, *supra*. There a steamer and a schooner collided, both vessels being at fault. The owners of the schooner were awarded damages as bailees of the cargo, but the steamer was allowed to recoup half of the value of the cargo—even though the schooner was not liable to the cargo owners (under Section 3 of the Harter Act, 46 U.S.C. § 192). The shipowner's statutory exemption from liability did not preclude a recovery against it under the maritime rule. Thus, appellee claims, the statutory limitation upon the employer's liability to his employee should not destroy his liability under the maritime rule.

We concede that *The Chattahoochee* is strong authority in favor of appellee's position. There is, of course, the obvious distinction in the fact that *The Chattahoochee* interprets the Harter Act while we are here called upon to interpret the Federal Employees' Compensation Act. But a mere comparison of statutory phraseology will not aid in resolving the problem. The Harter Act provides categorically that the shipowner shall not be liable for losses due to faults of navigation. While this command may not be so specific as that contained in the Compensation Acts, it is as clear and strong. But the language of the Harter Act must be considered in the light of the judicial gloss which has been placed upon it. In *American Mut. Liability Ins. Co. v. Matthews*, *supra*, we learn (182 F.2d at 324) that "The Harter Act was not intended to affect the liability of one vessel to the other in a collision case . . ." Can the same be said with respect to the Compensation Acts? We have already seen that such Acts cut off the spouse's right to damages for loss of consortium. And there is no sound reason why a distinction should be made between such cases and the case of a shipowner seeking contribution under the admiralty rule. The Acts, in establishing the duty of the employer and in making that duty exclusive, have abolished the independent rights of third parties against the employer for the damage which the employer causes them when he wrongfully injures his employee. Thus it must be candidly admitted that while the United States once had a duty to *other shipowners* to navigate carefully in order not to injure its own employees, that duty has been abrogated by the Compensation Act. We hold *The Chattahoochee* is not here controlling because it deals with a different statute which has encrusted upon it a significantly different judicial history.

The policy of an Act which precludes a wife's recovery for loss of consortium also precludes a shipowner's claim for contribution from a joint tortfeasor. The judgment below is *reversed* with directions to recompute damages without any allowance for the \$16,000 paid by appellee to the injured United States employee, Ostrom.

The government raised a second issue regarding the trial court's interpretation of the rules of the sea in connection

with the use of radar. Since both parties admitted the propriety of the trial court's finding of mutual fault, this issue does not bear upon the correctness of the judgment. Appellant briefed the issue only very sketchily and appellee has not briefed the issue at all. In the absence of an actual controversy with adequate briefing by both sides, this court should not be called upon to render a decision on the issue. It appears that the appellant is requesting an advisory opinion, and, of course, federal courts generally refrain from rendering such opinions. (*Muskrat v. United States*, 1911, 219 U.S. 346.) We so refrain here.

Reversed with instructions.

[File endorsement omitted].

[fol. 161]

IN UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 17187

UNITED STATES OF AMERICA, Appellant,

WEYERHAEUSER STEAMSHIP COMPANY, Appellee.

JUDGMENT—Filed and entered August 30, 1961

Appeal from the United States District Court for the Northern District of California, Southern Division.

This Cause came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California, Southern Division, and was duly submitted.

On Consideration Whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is reversed and that this cause be and hereby is remanded to the said District Court with directions to recompute damages without

any allowance for the \$16,000 paid by appellee to the injured United States employee, Ostrom.

Filed and entered August 30, 1961.

[fol. 162]

IN UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Before: Chambers, Barnes and Hamley, Circuit Judges.

ORDER DENYING PETITION FOR REHEARING—October 24, 1961

On consideration thereof and by direction of the court, It Is Ordered that the petition of appellant filed September 29, 1961 and within the time allowed therefor by rule of court for a rehearing of above cause be and hereby is, denied.

[fol. 163] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 164]

SUPREME COURT OF THE UNITED STATES

No. 674—October Term, 1961

WEYERHAEUSER STEAMSHIP COMPANY, Petitioner,

vs.

UNITED STATES.

ORDER ALLOWING CERTIORARI—March 5, 1962

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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In the Supreme Court F. DAVIS, CLERK

OF THE
United States

OCTOBER TERM 1962

No. ~~100~~ 65

WEYERHAEUSER STEAMSHIP COMPANY,	}	<i>Petitioner,</i>
vs.		
UNITED STATES OF AMERICA,		

**PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit.**

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In the Supreme Court
OF THE
United States

OCTOBER TERM 1961

No.

WEYERHAEUSER STEAMSHIP COMPANY,	}
<i>Petitioner,</i>	
VS.	
UNITED STATES OF AMERICA,	
<i>Respondent.</i>	

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit.

Petitioner Weyerhaeuser Steamship Company prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit rendered in the above-entitled case on August 30, 1961.

OPINIONS OF THE COURTS BELOW

The memorandum opinion of the District Court, printed in Appendix A hereto, *infra*, page i, is reported in 174

F. Supp. 663, and supplemented in 178 F. Supp. 496. The opinion of the Court of Appeals for the Ninth Circuit, printed in Appendix A hereto, *infra*, page xii, is reported in 294 F. 2d 179.

JURISDICTION

The jurisdiction of the district court was invoked by reason of petitioner's libel against the United States as a result of a maritime collision. 46 U.S.C. 781 et seq., 28 U.S.C. 1346. The United States filed a cross-libel, invoking the jurisdiction of the district court pursuant to 28 U.S.C. 1345.

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on August 30, 1961. A timely petition for rehearing, filed on September 29, 1961, was denied on October 24, 1961.

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254 (1).

QUESTION PRESENTED

Is the historic and established admiralty rule of divided damages in mutual fault collisions for the first time to be altered by a federal compensation statute?

STATUTE INVOLVED

The Federal Employees' Compensation Act, 5 U.S.C. 751, et seq., provides in pertinent part as follows:

5 U.S.C. 757 (b)—“The liability of the United States or any of its instrumentalities under Sections 751-756, 757-791, and 793 of this title or any extension thereof with respect to the injury or death of an employee shall be exclusive, and in place, of all other liability of the United States or such instrumentality to the employee, his legal representative, spouse, dependents, next of kin, and anyone otherwise entitled to recover damages from the United States or such instrumentality, on account of such injury or death, in any direct judicial proceedings in a civil action or in admiralty, or by proceedings, whether administrative or judicial, under any other workmen's compensation law or any Federal tort liability statute . . .”

STATEMENT OF THE CASE

On September 8, 1955, the Liberty ship SS F.E. WEYERHAEUSER, owned by petitioner, and the Army Dredge PACIFIC, owned by the Corps of Engineers of the United States Army, collided. (R. 5, 6) After the filing of a libel by petitioner (R. 3) and a cross-libel by the United States (R. 16), the District Court found both vessels were to blame and, according to the settled admiralty doctrine, ordered that each vessel was entitled to recover from the other one-half of all provable damages and court costs. (R. 71-78)

As a result of this collision one Reynold E. Ostrom, a seaman aboard the PACIFIC and a Civil Service Employee of the United States, sustained personal injuries. (R. 72) Ostrom was an “employee of the United States” within the coverage of the Federal Employees' Compen-

sation Act, 5 U.S.C. Sections 751 *et seq.* (R. 72) He received \$329.01 as statutory compensation and then commenced a separate action in the District Court against petitioner to recover general damages for his injuries. (R. 73) This action was settled by petitioner by the payment of \$16,000 to Ostrom, which was stipulated to be a reasonable amount by the United States (R. 68), and Ostrom reimbursed the United States the full \$329.01 compensation.

The \$16,000 paid by petitioner to Ostrom was specifically held by the District Court, with the Government protesting, to be a proper item of the damages to be divided pursuant to the accepted admiralty formula. (R. 74) The Government protested the inclusion of the item in a Motion for Rehearing, which was limited to that matter. (R. 79) After the District Court denied a rehearing (R. 92), the United States sought review in the Court of Appeals for the Ninth Circuit. The case was argued and submitted on August 1, 1961. (R. 148) On August 30, 1961 the court below reversed and remanded the case to the District Court with directions to recompute damages without allowance for the \$16,000 paid by petitioner to Ostrom. Appendix A. A timely petition for rehearing was made on September 29, 1961 (R. 162) and denied on October 24, 1961. (R. 162) Petitioner applied pursuant to 28 U.S.C. Section 2101 (f) for a stay of mandate upon the decision of August 30, 1961 in order to seek a review of the matter by this Court. On December 26, 1961 the Court of Appeals for the Ninth Circuit ordered the mandate stayed pending the disposition of this petition to be filed on or before January 20, 1962.

REASONS FOR GRANTING THE WRIT**I**

THE COURT OF APPEALS HAS CREATED THE FIRST KNOWN EXCEPTION TO THE RULE OF DIVIDED DAMAGES IN ADMIRALTY IN MUTUAL FAULT COLLISIONS, REQUIRING SUPREME COURT REVIEW OF THIS IMPORTANT QUESTION.

The rule of divided damages between the vessels in a mutual fault collision has long been accepted in courts of admiralty. *The North Star* (1882) 106 U.S. 17, 21. This Court recently stated the accepted rule in *Halcyon Line v. Haenn Ship Ceiling and Refitting Corporation* (1952) 342 U. S. 282, 284:

“Where two vessels collide due to the fault of both, it is established admiralty doctrine that the mutual wrongdoers shall share equally the damages sustained by each, as well as personal injury and property damage inflicted on innocent third parties. This maritime rule is of ancient origin and has been applied in many cases, but this Court has never expressly applied it to non-collision cases.”

The decision of the Court of Appeals for the Ninth Circuit creates the first exception to the divided damages rule, and in so doing, creates enormous potential liability for private shipowners without participation by an equally negligent Government vessel. Because this exception to the divided damages rule has been judicially legislated by the Court of Appeals and is of vital importance for the American shipping industry, this Court should grant review.

The retreat from the accepted policy that the two negligent ships in a both-to-blame collision divide the results of their negligence equally is justified by the Court of

Appeals by reason of the "exclusive liability" Section 757 (b) of the Federal Employees' Compensation Act. The Court states (Appendix A, *infra*, p. xxiv; 294 F. 2d 179, 185):

"Thus it must be candidly admitted that while the United States once had a duty *to other shipowners* [emphasis by the court] to navigate carefully in order not to injure its own employees, that duty has been abrogated by the [Federal Employees'] Compensation Act."

It is respectfully submitted that the rationale of the Court of Appeals is so clearly erroneous and in conflict with applicable decisions of this Court and Congressional enactments that review should be granted.

A. Sovereign immunity of the United States is not a valid ground for denying the application of the divided damages rule to personal injury settlements.

The Court of Appeals in its opinion states that if the settlement to Ostrom were included in the damages to be divided by the two vessels, the sovereign immunity of the United States would be violated. The court states (Appendix A, *infra*, p. xix; 294 F. 2d 179, 182):

"We do not presume that if there had never been a retreat by the United States from its absolute non-liability as a sovereign, appellee could or would here maintain that such claim of sovereignty was inferior to the right established by admiralty law, no matter how ancient, simply because unfair to the shipowner. . . . But can a limited waiver of sovereign immunity be enlarged by indirection, i.e. through the negligent act of a third party—the shipowner? We think not."

Because the statements of the Court of Appeals on sovereign immunity are inconsistent with the opinions of this Court and the expressions of congressional intent found in legislation, this Court should grant review to prevent further error in the large number of admiralty cases raising these points which come before the Court of Appeals for the Ninth Circuit.

The opinion of the court below would be in accord with this Court, if Mr. Justice Holmes had not reversed his very strict view of sovereign immunity expressed in *The Western Maid* (1922) 257 U.S. 419. In that case this Court held in a majority opinion by Holmes that the sovereign immunity of the United States prevented any affirmative relief in collision cases for private vessels unfortunate enough to be in collision with Government-owned vessels. But Mr. Justice Holmes, once more for the majority, reversed himself and specifically made the United States subject to affirmative relief in a mutual fault collision. *The Thekla* (1924) 266 U.S. 238. Subsequent to that decision, the Congress passed the Public Vessels Act of 1925, 46 U.S.C. 781-790. The intent of this statute was that the United States be liable *in rem* and *in personam* just as a private shipowner when federal vessels have tortiously caused personal injury or property damage. *Canadian Aviator Limited v. United States of America* (1945) 324 U.S. 215. In *United States v. Shaw* (1940) 309 U.S. 495, this Court affirmed the inapplicability of sovereign immunity as a shield for the United States in mutual fault collisions.

Petitioner respectfully submits that the burden should be placed on the Government in this case to show that

Section 757 (b) of the Federal Employees' Compensation Act has altered the existing law that the sovereign immunity of the United States is not a good defense to inclusion of the Ostrom settlement as an element of the affirmative relief against the United States in a mutual fault collision.

- B. Congress did not intend to make the third person unfortunate enough to injure a beneficiary of a Compensation Act the gratuitous statutory indemnitor of the beneficiary's wrongdoing employer.**

By barring the inclusion of the amount paid by way of settlement to Ostrom from the damages to be shared on grounds of the Compensation Act, the Court of Appeals attributes to Congress the intention of not only giving the employee a new cause of action against the employer but also by indirection the intention to take away all existing rights by third persons against the negligent employer. Petitioner respectfully submits that the words of Section 757 (b) of the Federal Employees' Compensation Act do not justify this conclusion of the Court of Appeals.

The limitation of the general words in Section 757 (b) "anyone otherwise entitled to recover damages from the United States"¹⁵ to "the employee, his legal representative, spouse, dependents, and next-of-kin"—to the exclusion of those with claims unrelated to the employment nexus—accords fully with the normal scope of workmen's compensation legislation. It is generally recognized that these statutes deal with the relationship of the employer with his employees and their dependents and that it is not to be assumed, in the absence of an express indication to

¹⁵ U.S.C. 757(b).

the contrary, that they are designed to interfere with the relationships of the employer with third persons. *American District Telegraph Company v. Kittleson* (8th Cir., 1950) 179 F. 2d 946; *Lunderberg v. Bierman* (1954) 63 N.W. 2d 355, 365; *Westchester Lighting Company v. Westchester County Small States Corporation*, 278 N.Y. 175, 179-180.

The opinion of the Court of Appeals should be reviewed by this Court to determine whether Congress intended to repeal rights of third parties against the Government in mutual fault collisions, in spite of the failure of the words of Section 757 (b) to so provide.

II

THE COURT OF APPEALS HAS DECIDED THAT "EXCLUSIVE LIABILITY" PROVISIONS OF FEDERAL COMPENSATION LEGISLATION BAR RECOVERY BY A THIRD PARTY AGAINST A NEGLIGENT EMPLOYER IN DIRECT CONFLICT WITH THE APPLICABLE DECISIONS OF THIS COURT.

In a series of decisions this Court has carefully considered the language of Section 5 of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 905, which is nearly identical to Section 757 (b) of the Federal Employees' Compensation Act and provides:

"The liability of an employer prescribed in Section 4 [for compensation] shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death. . ."

The Court of Appeals for the Ninth Circuit, in referring to the above-quoted section and Section 757 (b) of the Federal Employees' Compensation Act concludes (Appendix A, *infra*, xxv; 294 F. 2d 179, 185):

"The [Longshoremen's and Harbor Workers' and the Federal Employees' Compensation] Acts, in establishing the duty of the employer and in making that duty exclusive, have abolished the independent rights of third parties against the employer for the damage which the employer causes them when he wrongfully injures his employee."

Petitioner respectfully submits that this statement, which is the justification by the Court of Appeals for denying the inclusion of the Ostrom settlement in the damages to be divided, is in direct conflict with decisions of this Court on the legal effect of "exclusive liability" provisions of Federal Compensation Acts.

In *Ryan Stevedoring Company, Inc. v. Pan-Atlantic Steamship Corporation* (1956) 350 U.S. 124, this Court held that where the injuries to the longshoremen-employee occurred through the fault of his employer, the third party shipowner has a right to receive full reimbursement from the stevedoring employer, regardless of the existence of the "exclusive liability" provision of the Longshoremen's and Harbor Workers' Compensation Act. Since that decision several other cases in this Court have confirmed the *Ryan* holding. *Weyerhaeuser Steamship Company v. Nacirema Operation Company, Inc.* (1958) 355 U.S. 563; *Crumady v. The Joachim Hendrick Fisser* (1959) 358 U.S. 423.

The decision of this Court in *Ryan Stevedoring Company, Inc. v. Pan-Atlantic Steamship Corporation*² was on the grounds of the existence of an express contract between the shipowner and the negligent employer, a possible distinction between the facts of that case and the instant one. The cases following *Ryan*, however, have permitted recovery by the third party shipowner on grounds of an implied contract (*Weyerhaeuser Steamship Company v. Nacirema Operating Company, Inc.*³) and a third party beneficiary theory (*Crumady v. The Joachim Hendrick Fisser*⁴). This Court should grant review to affirm that the absence of a contractual relationship between vessels in collision should not alter the principles expressed in the existing Federal Compensation Act cases in regard to Congressional intention in passing these statutes.⁵ As the Government argued to this Court in the *Ryan* case: "The compensation acts, in conferring immunity on the employer from common law suits by the employee and his dependents, did not mean to free the employer from suits by outsiders."⁶

² (1956) 350 U.S. 124.

³ (1958) 355 U.S. 563.

⁴ (1959) 358 U.S. 423.

⁵ It is significant that State courts in interpreting comparable "exclusive liability" provisions of compensation acts have held that the lack of an express contract for indemnity between a third party and a negligent employer is not a bar to recovery by the third party from the employer for amounts paid to an injured employee: *Raugh v. Rogers* (1944) 24 Cal. 2d 200, 148 P. 2d 785; *S.F. Unified School District v. Cal. Building* (1958) 162 Cal. App. 2d 434, 328 P. 2d 785; *Montgomery Ward & Company v. KPIX Westinghouse Broadcasting Company, Inc.*, District Court of Appeal, First District, California; opinion filed January 5, 1962.

⁶ 4583 U.S. Supreme Court Records, Docket 4, Brief for the United States as Amicus Curiae at page 44.

III.

THE COURT OF APPEALS HAS ADOPTED A RULE OF VESSEL LIABILITY IN MUTUAL FAULT COLLISIONS IN DIRECT CONFLICT WITH ACCEPTED ADMIRALTY PRINCIPLES, REQUIRING AN EXERCISE OF THIS COURT'S POWER OF REVIEW.

In denying the right of petitioner to include the Ostrom settlement as an item of damages in this collision, the Court of Appeals makes an analogy to the denial in *Smithers & Company, Inc. v. Coles* (D.C.Cir., 1957) 242 F. 2d 220, cert. den. 354 U.S. 914, of the wife's right under the Longshoremen's and Harbor Workers' Compensation Act to recover for loss of consortium. Petitioner respectfully submits that the nature of the liability of a vessel in a mutual fault collision differs fundamentally and historically from such derivative causes of action as represented by the cause of action for loss of consortium as well as from accepted tort principles of contribution between joint tortfeasors. This Court recognized the distinction in *United States v. Shaw, supra*:

"*The Thekla* turns upon a relationship characteristic of claims for collision in admiralty but entirely absent in claims and cross-claims in settlement of estates. The subject matter of a suit for damages in collision is not the vessel libelled but the collision. Libels and cross-libels for collision are one litigation and give rise to one liability. In equal fault, the entire damage is divided." (at page 502)

The special nature of a suit for division of damages after a mutual fault collision has been recognized by this Court in requiring the inclusion of cargo damage as an

item to be divided by the negligent vessels. Even though the Harter Act, 46 U.S.C. 192, provides categorically that cargo cannot collect directly from the carrying vessel for damages as a result of faults in navigation, this Court has held that the carrying vessel must share, according to the accepted divided damages rule, damages sustained by the non-carrying vessel attributable to its own cargo in a mutual fault collision. *The Chattahoochee* (1899) 173 U.S. 540, 551-555; *The Sucarseco* (1934) 294 U.S. 394. See also *The Toluma* (2d Cir. 1934) 72 F. 2d 690, 692.

Petitioner respectfully submits that the principle in issue herein is no different than the rule that vessels in a mutual fault collision share cargo damage regardless of the "immunity" for the carrying vessel given by the Harter Act.

IV.

BY HOLDING THAT IN A MUTUAL FAULT COLLISION THE UNITED STATES COULD NOT BE CALLED UPON TO SHARE THE ITEM OF DAMAGES RESULTING FROM PAYMENTS BY THE OTHER VESSEL TO GOVERNMENT EMPLOYEES, THE COURT OF APPEALS FOR THE NINTH CIRCUIT IS IN CONFLICT WITH THE COURT OF APPEALS FOR THE FOURTH CIRCUIT.

In *The Washington-Ruchamkin* (1959) 172 F. Supp. 905; affirmed upon the opinion of the District Court (1959) 272 F. 2d 711, the argument advanced by the United States in the instant case was rejected by the Court of Appeals for the Fourth Circuit. Four soldiers were killed aboard the Government vessel as a result of a collision with a privately owned tanker. There was a determination of mutual fault. The Court then found that

the privately owned vessel was entitled to include as an item of damages payments made by it to claimants injured in the collision without any deduction for damages paid by the Government as statutory death gratuities, indemnity or compensation. In the course of its opinion the court stated:

"But the court now holds that the Texas Company should be granted a judgment against the United States for one-half of the present awards, as a part of Texas' collision damages, without deduction for the veteran benefits." (Citing *The North Star*, *supra*, *The Chattahoochee*, *supra*, and *Halcyon Lines v. Haenn Ship Ceiling and Refitting Corporation*, *supra*.) (at pages 909-910)

The opinion of the Court of Appeals for the Ninth Circuit dismisses *The Washington-Ruchamkin* case on the grounds that the point of the inclusion of amounts paid to injured Government employees as an element of damages was not contested by the Government. Petitioner's Petition for a Rehearing refutes this point. See Appendix B. The material in Appendix B establishes conclusively that the point in issue in the instant case was also in issue and contested throughout the *The Washington-Ruchamkin* case and was settled by Judge Bryan's opinion in the District Court, which was adopted by the Court of Appeals for the Fourth Circuit as its opinion.

Although the Federal Employees Compensation Act was not in issue in *The Washington-Ruchamkin* case, the servicemen's survivors had rights for indemnification against the Government solely because of the Servicemen's Indemnity Act of 1951, 38 U.S.C. 851; that is, the sovereign im-

munity of the United States would have prevented any direct action against the Government to recover for the loss of these men killed in the maritime collision, except for the rights granted dependents by this federal legislation. Petitioner submits that the holding of the Court of Appeals for the Fourth Circuit in the *The Washington-Ruchamkin* case is thus in conflict with the holding of the Court of Appeals for the Ninth Circuit in the instant case and justifies review by this Court.

CONCLUSION

A writ of certiorari should be granted in accordance with the prayer of this petition.

Dated, San Francisco, California,
January 17, 1962.

Respectfully submitted,

CHALMERS G. GRAHAM,

HENRY R. ROLPH,

Proctors for Petitioner.

GRAHAM JAMES & ROLPH,

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Of Counsel.

(Appendices Follow.)

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Appendix A

OPINIONS AND JUDGMENTS OF THE COURTS BELOW

OPINION OF THE DISTRICT COURT,

DATED JULY 2, 1959

In the United States District Court for the Northern
District of California, Southern Division

No. 27,359

Weyerhaeuser Steamship Company,
a corporation,

Libelant,

vs.

United States of America,

Respondent.

United States of America,

Cross-Libelant,

vs.

Weyerhaeuser Steamship Company,
a corporation,

Cross-Respondent.

St. Paul Fire & Marine Insurance Co.,
a corporation, and Fireman's Fund In-
surance Co., a corporation,

Intervening Libelants.

Roche, District Judge.

This is an action by libelant, owner of the F. E. Weyerhaeuser, brought under the provisions of Public Vessels

Act, 46 U.S.C.A. § 781 et seq., against respondent, owner of the Pacific, for damages sustained by the Weyerhaeuser in a collision between the two vessels. Cross-libel by respondent for damages suffered by the Pacific.

At 5:30 P.M. on September 8, 1955, the Weyerhaeuser, a steel "Liberty" type cargo vessel 441 feet long with a gross tonnage of 7,218 tons, and the Pacific, a steel hopper dredge of 837 tons and 180 feet in length, collided approximately one and one-half miles west and slightly south of Cape Arago light off the Oregon coast.

At the time of the collision the sea was calm with variable breezes. There was dense fog and visibility was poor.

The Weyerhaeuser was southbound from Coos Bay, Oregon to Los Angeles carrying a cargo of lumber. The Pacific was northbound from Bandon, Oregon to Coos Bay without a cargo. Each vessel alleges having radar knowledge of the other's progress on an opposing course 18 minutes prior to the collision, at which time the two were 2.8 miles apart. Each remained almost continuously cognizant, by radar, of the other's position and bearing up to the time of the collision. The Weyerhaeuser made at least one course change to port between 5:00 P.M. and the collision and was under way with her only lookout positioned on the bridge. The Pacific made three course changes to starboard in the half-hour preceding the collision. The bow of the Pacific collided with the starboard side of the Weyerhaeuser and the two vessels parted again almost immediately. Communications were established some 30 minutes later and the vessels were able to proceed back to port unassisted.

Having considered the evidence, the law and the briefs and arguments of counsel, the court makes the following findings of fact with respect to each vessel.

The Weyerhaeuser

[1-3] Respondent contends that the lookout on the Weyerhaeuser was improperly positioned. It is undisputed that at the time of the collision no lookout was stationed in the bow of the Weyerhaeuser, although one was positioned on the bridge. Rule 29 of the International Rules for Navigation at Sea requires that a proper lookout be kept.¹ The rules themselves do not prescribe where the lookout must be posted, but the courts have been rigid in holding that lookouts must be stationed as far forward as possible, especially when vessels are proceeding under conditions of reduced or obstructed visibility. *The Ottawa*, 1865, 3 Wall. 268, 70 U.S. 268, 18 L.Ed. 165; *The Adrastus*, 2 Cir., 1951, 190 F.2d 883; *Wood v. United States (The Bucentaur-Wilson Victory)*, D.C.S.D. N.Y. 1954, 125 F.Supp. 42. The Weyerhaeuser's knowledge that another vessel was approaching would make the command even more imperative. The record reveals no substantial evidence that weather or topographical conditions excused compliance with the rule. The requirement is so strict that the presumption of contributory fault arising from its neglect is the same as that created by statutory violation. *The Adrastus*, supra; *Wood v. United States (The Bucentaur-Wilson Victory)*, supra. Thus, the Weyerhaeuser is liable for her fault unless she can show that it did not and could not have contributed to the collision.

¹33 U.S.C.A. § 147a.

The *Pennsylvania*, 1873, 19 Wall. 125, 86 U.S. 125, 22 L.Ed. 148. She failed to do this; a bow lookout, being closer to the Pacific when she was sighted, might have given earlier warning and the time gained might have enabled the *Weyerhaeuser* to avoid the collision.

[4, 5] Rule 16 of the International Rules states that a vessel proceeding under conditions of restricted visibility shall go at a "moderate" speed.² Such a speed is one that would enable a vessel to stop in one-half the range of visibility. The *Silver Palm*, 9 Cir., 1938, 94 F.2d 754. Libelant contends that visibility was 375 feet. Assuming *arguendo* that figure to be correct, a "moderate" speed would have allowed the *Weyerhaeuser* to stop in half that distance, or 188 feet from the forwardmost point on the ship that lookout was maintained. As the distance from bow to bridge on the *Weyerhaeuser* is 205 feet, and the forwardmost lookout was positioned on the bridge, it follows that no speed could have been "moderate" under the circumstances. The evidence is convincing that the *Weyerhaeuser* was moving fast when the two ships collided. The nature of the damage, the distance she traveled after collision, inadvertent admissions from her crew, dubious log and bell book entries and testimony from those aboard the *Pacific* who observed her all lead to that conclusion. And it is undisputed that she was under way until minutes before impact, with the same conditions prevailing. Again, the *Weyerhaeuser* was unable to sustain the burden imposed upon her by statutory violation. The *Pennsylvania*, *supra*. She is liable for contributory fault on a second count.

²33 U.S.C.A. § 145n.

[6] Rule 18 provides that when two vessels are meeting end on, or nearly so, each shall alter course to starboard so as to effect a port-to-port passing.³ The record discloses that the Weyerhaeuser and the Pacific admit detecting each other on opposing courses as early as 5:12 P.M. The Pacific turned to starboard but the Weyerhaeuser turned to port, and again they were on collision courses. Rule 18, written before the advent of radar as an aid to navigation, specifically refers to instances in which the vessels or their lights are visible to each other. This court can see no reason why its application should not extend to a situation in which two vessels "see" each other by radar.

It is argued that under the conditions of the instant case a right turn was not warranted because neither vessel could know that the other had radar and would abide by the rules. But even if the Pacific had not had radar, and had maintained a straight course, a right turn by the Weyerhaeuser would have avoided the collision and the same is true if the situation is reversed. Certainly, a left turn was totally unjustified. It is difficult to see how application of Rule 18 under these conditions would have anything but a positive effect upon safety.

Two cases are cited in support of the position that the meeting and passing rules do not apply in fog. *Borcich v. Ancich*, 9 Cir., 1951, 191 F.2d 392; *The George F. Randolph*, D.C.S.D.N.Y. 1912, 200 F. 96. Both are distinguishable from the instant case. In the former, fog made the burdened vessel unable to determine that there was an

³33 U.S.C.A. § 146b.

other vessel to starboard, and in the latter both vessels were uncertain of each other's location in the fog. Here, the Weyerhaeuser knew the location and course of the Pacific when she was almost three miles away. The court must conclude that the Weyerhaeuser should have turned right instead of left, and that her failure to do so is a statutory violation. She was unable to prove that her fault could not have contributed to the collision, and under the Pennsylvania rule, she is again liable.

The Pacific

[7, 8] Libelant asserts that the Pacific was proceeding at an "immoderate" rate of speed in violation of Rule 16.⁴ Respondent alleges that the Pacific was moving at Slow Ahead and that her headway was practically stopped when the Weyerhaeuser struck her. The testimony from those aboard the Pacific is inconsistent and contradictory. The tendency of officers and crew to "stick by the ship" in such matters is well known. The Silver Palm, *supra*. The Pacific's logs are grossly inadequate. The absence of log entries tends to discredit the testimony of witnesses from the vessel on disputed issues. *Arkansan-Knoxville City*, D.C.S.D.Cal., 1939 A.M.C. 352.

[9-11] Second Assistant Engineer Martin of the Pacific recorded the orders that he received immediately prior to the collision in his personal notebook and in the engine room log. The notebook relates, " * * * 5:30 P.M. * * * Heavy Fog—Whistle Operating—Martin on Throttles—Engines Full Ahead—Received 'Slow' port and starboard followed by immediate Full Astern * * * About 10

⁴33 U.S.C.A. § 145n.

seconds later felt impact from bow * * * Time from Slow Ahead to Full Astern not over 5 seconds." These observations were recorded shortly after the collision, were later confirmed by Martin (although loyalty induced him to attempt to moderate their impact at the trial) and have not been shown to be influenced by considerations reflecting upon their credibility. In the event of conflict between deck officers and engine room personnel as to a vessel's speed changes, the testimony and records of the latter are entitled to greater credence because they have better means of knowledge. The Bowns-Pattison Transportation Company v. The Beverly, The Brinton, D.C.S.D. N.Y. 1915, 1934 A.M.C. 316. Upon the presumptions created by the absence or alteration of log entries and the unconscious or reluctant admissions against the ship, many cases must be decided. The Ernest H. Meyer, 9 Cir., 1936, 84 F.2d 496. The court finds that the Pacific was proceeding at her full speed of 7 knots prior to the collision.

Captain Albee testified that in his opinion the Pacific could come to a stop from full ahead in three lengths of the vessel, or approximately 540 feet. The most generous estimates of visibility at the time in question placed it at 375 feet. It is clear that the Pacific was not proceeding within the "moderate" speed required by statute, since she was not able to stop within one-half the range of visibility, or 188 feet. The Silver Palm, *supra*. The record substantiates this conclusion and indicates that had the Pacific been able to stop in her share of the range of visibility the collision might have been avoided. Respondent was unable to overcome the presumption of contribu-

tory fault arising from the Pacific's violation of Rule 16. The *Pennsylvania*, *supra*.

Respondent contends that the Pacific's faults, if any, were committed *in extremis* and may be excused. But the nature of an error *in extremis* is that it is committed when collision is imminent and there is no opportunity to exercise proper judgment. The *Chinook*, 2 Cir., 1929, 34 F.2d 614. There are no hard or fast rules to apply, but the error of the Pacific was clearly not committed *in extremis*. Captain Albee admits turning the Pacific sharply to starboard five minutes before the collision and the preponderance of evidence shows that the Pacific then proceeded at "immoderate" speed on her new course. Evidently Albee's intention was to remove the Pacific from the danger area as quickly as possible in whatever time remained. Albee may have been unfortunate but the court cannot avoid the conclusion that prudent seamanship would have been a satisfactory cure.

[12] The International Rules require that a vessel hearing the fog signal of another vessel, the position of which is not ascertained, shall stop her engines and then navigate with caution until the danger is past.⁵ The record discloses that neither vessel stopped her engines upon first hearing the fog signal of the other, but that at the time, each had the other's position located on her radar screen. The court is of the opinion that "ascertainment" of a vessel's position by radar is adequate justification for failure to comply with the technical requirement that engines be stopped.

⁵33 U.S.C.A. § 145n.

In view of the foregoing it is the finding of this court that the collision was caused by the mutual fault of the Weyerhaeuser and the Pacific.

[13] Libelant and cross-respondent Weyerhaeuser Steamship Company and respondent and cross-libelant United States of America are each entitled to recover from the other one-half of all provable damages and court costs sustained as a result of this collision according to the settled admiralty law in cases of mutual fault collisions.

In accordance with the foregoing, if the parties cannot agree on the amount of damages, the matter shall be referred to a special commissioner to take evidence upon the amount of damages sustained by each party and to calculate the net balance payable as between the Weyerhaeuser Steamship Company and the United States of America.

It is so ordered.

**SUPPLEMENTAL OPINION OF THE DISTRICT COURT,
DATED JULY 13, 1959**

**In the United States District Court for the Northern
District of California, Southern Division**

**No. 27,359
July 13, 1959.**

**Weyerhaeuser Steamship Company,
a corporation,**

Libelant,

vs.

United States of America,

Respondent.

United States of America,

Cross-Libelant,

vs.

**Weyerhaeuser Steamship Company,
a corporation,**

Cross-Respondent.

**St. Paul Fire & Marine Insurance Co.,
a corporation, and Fireman's Fund In-
surance Co., a corporation,**

Intervening Libelants.

Roche, District Judge.

**The following paragraphs are hereby added to the mem-
orandum opinion of this court in the above-entitled matter
filed July 2, 1959, 174 F.Supp. 663:**

Intervening libelants St. Paul Fire & Marine Insurance Co., Firemen's Fund Insurance Co., and Boston Insurance Co. are entitled to recover from respondent and cross-libelant United States of America all recoverable damages sustained by them and their insured cargo owners as the result of this collision, together with costs.

With respect to Civil action No. 4255 pending in the U. S. District Court for the Western District of Washington entitled Ostrom v. Weyerhaeuser Steamship Company, which action involves a claim for personal injuries allegedly sustained by said Ostrom in this collision, if the ascertainment of the amount of recoverable damages as between Weyerhaeuser Steamship Company and the United States is referred to a special commissioner then said special commissioner shall report to this court the amount if any paid by Weyerhaeuser Steamship Company to said Ostrom in compromise of said lawsuit or the satisfaction of final decree therein leaving the question as to whether such an amount is a recoverable item of said Weyerhaeuser Steamship Company's damages herein for decision by this court.

It is so ordered.

**OPINION OF THE COURT OF APPEALS,
DATED AUGUST 30, 1961**

**United States Court of Appeals
for the Ninth Circuit**

United States of America,

vs.

Weyerhaeuser Steamship Company,

Appellant,

Appellee.

No. 17,187

Aug. 30, 1961

**On Appeal from the United States District Court
for the Northern District of California,
Southern Division.**

**Before: CHAMBERS, BARNES and HAMLEY, Circuit
Judges**

BARNES, Circuit Judge:

This case arises in admiralty upon a libel against the United States, and a cross-libel filed by the United States. The district court thus had jurisdiction under 28 U.S.C. §§ 1345 and 1346, and 46 U.S.C. § 782. A final decree was entered below, and this court has jurisdiction under 28 U.S.C. § 1291.

On September 8, 1955, appellee's vessel, the S.S. F. E. WEYERHAEUSER, collided with appellant's vessel, the United States Army dredge PACIFIC, off the coast of Oregon. The trial court found that both parties were at fault and this finding is not challenged here. The accident caused significant damage to both vessels, and resulted in personal injury. Reynold Ostrom, an employee of the

United States serving on the PACIFIC, recovered compensation from the United States in the amount of \$329.01 under the Federal Employees' Compensation Act (5 U.S. C. §§ 751, *et seq.*). Ostrom also recovered \$16,000 from appellee by settlement. St. Paul Fire & Marine Insurance Company intervened claiming \$19,122.75 as damages under its policy of marine insurance for its cargo general average contribution arising out of the collision, and Fireman's Fund Insurance Company likewise intervened, claiming \$923.85 for its marine insurance cargo general average contribution. The court found (Finding II, Tr. 72) the intervenors had made such general average payments, and also found in favor of intervenor Boston Insurance Company in the sum of \$443.54, on the same basis, or a total general average recovery of \$20,490.14.

In accordance with its findings of mutual fault the trial court divided the damages between the parties as required by maritime law. It found that each party suffered damages as follows:

Weyerhaeuser Steamship Company:

\$27,652.13	physical and detention damages of the S.S. F. E. WEYERHAEUSER
16,000.00	paid to Ostrom in settlement of suit against it.

\$43,652.13 Total provable damages.

United States of America:

\$16,949.12	physical and detention damages of the PACIFIC
20,490.14	payable to intervening libelants (insurance)

\$37,439.26 Total provable damages

(Finding of Fact IV, R. p. 74) Since appellee's provable damages exceeded appellant's damages by \$6,212.87, the court awarded appellee judgment in the sum of \$3,106.44, plus interest. Appellant, claiming that the court erred in including the \$16,000 personal injury award in appellee's provable costs, has taken this appeal.

Appellant does not deny the antiquity or propriety of the maritime rule requiring the apportionment of damages in cases of mutual fault. Appellant also does not deny that in most instances the apportionment rule applies to damages occasioned by personal injuries. Appellant does contend, however, that the apportionment rule does not apply to damages arising from an injury to any employee covered by the Federal Employees' Compensation Act. Under 5 U.S.C. § 757(b), the liability of the United States, under the Act, with respect to the injury or death of an employee is "exclusive and in place of all other liability of the United States . . . to the employee . . . and anyone otherwise entitled to recover damages from the United States . . . on account of such injury or death. . . ." This statute on its face, then, does seem to save the United States harmless from any liability from injury to its employees other than that specified by the statute. The government points out that statutes such as these are "give and take" arrangements. The employer loses his defenses to the employee's action and the employee gets a remedy which is fast and certain. The employer, on the other hand, enjoys a liability which is limited and determinative. To permit recoveries beyond that specifically allowed by the Act would be subversive of the statutory scheme. This is so, appellant contends, even with respect to recoveries by third parties—what cannot be accom-

plished directly should not be permitted by the indirect means of a third party recovery.

That the Federal Employees' Compensation Act provides the sole remedy for injured employees of the United States is well established. That was the only question before the Supreme Court in *Patterson v. United States*, 1959, 359 U.S. 495. And it affirmed *Johansen v. United States*, 1952, 343 U.S. 427, 441, which states: The United States "has established by the Compensation Act a method of redress for its employees. There is no reason to have two systems of redress." (343 U.S. at 439.)¹

¹And see: *Lewis v. United States*, D.C.Cir. 1951, 190 F.2d 22; *Sasse v. United States*, 7 Cir. 1953, 201 F.2d 871; *Smithers & Company, Inc. v. Coles*, D.C.Cir. 1957, 242 F.2d 220, cert. denied 354 U.S. 914; *Underwood v. United States*, 10 Cir. 1953, 207 F.2d 862.

Earlier this year, when this court considered the exclusiveness of an injured person's remedy under the Federal Employees' Compensation Act (46 U.S.C. § 751, *et seq.*) vis-a-vis the Federal Tort Claim Act (28 U.S.C. § 1346(b)), this court said:

"The language of §§ 751(a) and 757(b) of the Federal Employees' Compensation Act . . . is plain and unambiguous. Under the statute the employee, regardless of any negligence, is to receive in case of injury certain definite amounts, which recovery 'shall be exclusive, and in place, of all other liability of the United States.' His recovery is not dependent upon the injury being caused by the negligence of any employees of the United States nor is it reduced or taken from him if the injury is the result of his own negligence. That the remedy provided by the Federal Employees' Compensation Act is to be exclusive is shown by the legislative history of Congress at the time that the statute was amended in 1949. The House Committee Report contains the following:

'It is the committee's purpose to have the language of such Section 7 entirely clear in this respect so as to express the intention that the compensation remedy shall henceforth be the exclusive remedy of a person protected by this act against the United States, or against its instrumentalities in cases in which a suable instrumentality is the employer.' Similarly, the Senate Report states:

'The purpose of the latter is to make it clear that the right to compensation benefits under the act is exclusive

In furtherance of this policy it has been held that a joint tortfeasor may not seek contribution or indemnity from the United States when the joint tortfeasor is sued by the administrator of a deceased United States employee (*Christie v. Powder Power Tool Corp.*, D.D.C. 1954, 124 F.Supp. 693). Appellee contends, however, that this case cannot control here, for it does not deal with the admiralty rule requiring apportionment of damages. Appellee points out that the trial court did not award it any sum as compensation for the injury suffered by Ostrom. Rather the award reflects the damage which appellee suffered as a result of the collision when it was required to compensate Ostrom for his injuries. In other words, appellee sought and received recovery in its own right for appellant's breach of duty to it under the maritime law; appellee claims that its right is not derivative from any right which Ostrom may have had.

The question presented here is a difficult one. Its resolution will abridge either the statutory policy or the maritime law. To allow a third party recovery against the United States on any ground is subversive of the statute limiting the liability of the United States. On the other hand, the money paid to Ostrom is an element of the total damages suffered by appellee. And failure to apportion

and in place of any and all other legal liability of the United States or its instrumentalities of the kind which can be enforced by original proceeding whether administrative or judicial, in a civil action or in admiralty or by any proceeding under any other workmen's compensation law or under any Federal tort liability statute.'

It thus appears that neither the plain language of the statute, its legislative history, nor the prior construction of similar statutes permits a recovery by appellant." (*Posegate v. United States*, 1961, 288 F.2d 11 at 14.)

such damages is a breach of the maritime rule—for the rule requires the apportionment of all damages suffered, without regard to the fact that some of those damages stem from liabilities which could not be imposed against one of the parties but for the apportionment. (*The Chattahoochee*, 1899, 173 U.S. 540.) There appear to be no cases which can be described as controlling, but there are some precedents which may be helpful.

With the first portion of our last statement appellee would not agree. It refers us to *United States v. The S. S. Washington*, E.D.Va. 1959, 172 F.Supp. 905, and *Texas Co. v. United States*, 4 Cir., 1959, affirmed without opinion 272 F.2d 711 (no petition for writ of certiorari filed).

It is true that Judge Bryan in the *Washington-Ruchamkin* case, *supra*, did grant Texas Company, the private shipowner, judgment against the United States (for one-half of the awards made against the Texas Company in favor of the heirs of four soldiers killed aboard the government vessel in the collision)—and also ordered such judgment without deduction for the veterans benefits already paid by the government to the soldiers' heirs. We point out two things. First: the *Washington-Ruchamkin* case was, unlike this present action, brought under the Death on the High Seas Act, 46 U.S.C. § 761. This action was brought under 46 U.S.C. §§ 781-790, the Public Vessels Act. Yet both Acts must be construed together in laying down the pattern and marking the restrictions under which the United States may be sued. *Mejia v. United States*, 5 Cir. 1945, 152 F.2d 686, *cert. denied* 328 U.S. 862; *United States v. Caffey*, 2 Cir. 1944, 141 F.2d 69. Secondly: (and of greater importance) Judge Bryan listed

four issues before him, after the fourth circuit had held "The Texas Company also at fault." The first three do not concern² us here; the fourth assumes as *admitted* the very legal question here in issue.² We do not know why this admission was made by the government in the *Washington* case. But no such admission was made in the instant case. And, of course, the government is not estopped from taking a position here contrary to that it has invariably or occasionally taken previously. *Utah Power & Light v. United States*, 1917, 243 U.S. 389, 409; *United States v. City and County of San Francisco*, 1941, 310 U.S. 16, 32.

Appellee concludes its references to the *Washington* case in its brief with the following appeal to the court's conscience:

"The fact is that the United States with knowledge of the admiralty mutual fault collision rule enacted a scheme of compensation for its employees injured in the performance of duty without reference to negligence. Insofar as Weyerhaeuser is concerned the employee's compensation has nothing to do with this collision and should have no bearing on Weyerhaeuser's right to have all the damages resulting from the collision mutually apportioned between the two vessels. Any other result would be grossly unfair."

²The opinion raises as the fourth question before the court:

"(d) whether against the *admitted* right of The Texas Company to reimbursement from the government for one-half of the death awards as collision damages, the United States may offset the sums paid and payable by the government to the decedents' dependents as statutory death gratuities, indemnity, and compensation." (Emphasis added.) 172 F.Supp. 905 at 907.

Whether fair or unfair, the Supreme Court has established the rule that the United States cannot be burdened *directly* with tort liability for injuries sustained by its employees. We do not presume that if there had never been a retreat by the United States from its absolute nonliability as a sovereign, appellee could or would here maintain that such claim of sovereignty was inferior to the right established by admiralty law, no matter how ancient, simply because unfair to the shipowner. Any claim of sovereign immunity is to some extent always unfair to the one who has sustained loss or damage.

But can a limited waiver of sovereign immunity be enlarged by indirection, i.e., through the negligent act of a third party—the ship owner? We think not.

There has been no question for one hundred years as to the general maritime rule that a total loss in collision cases is divided where both vessels are at fault. *The Catherine*, 1954, 58 U.S. 171, 177; *Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp.*, 1952, 342 U.S. 282. And appellee cites to us as examples where damages *have been allowed* against the government two cases: *The City of Rome*, 2 Cir. 1930, 38 F.2d 782, 786; *Chicago-Silverpalm*, 9 Cir. 1937, 94 F.2d 771.

The City of Rome concerned itself only with an attempt to exempt or limit liability by Ocean Steamship Company (as the owner of *The City of Rome*) from the claims of Goldye M. Dobson, as Administratrix, against it; and its claim for damages against The United States for property damages. Judge Learned Hand specifically avoided any “question of marshalling the proceeds of the *Rome* as between the United States and the private claimants.”

Further, this case was decided in 1930. Title 5 U.S.C. § 757(b) (the exclusive liability subsection) was created by the Act of October 14, 1949, Sec. 303(g). It was given but a limited retroactive effect. (See U.S. Code, 1952 Ed., Title 1-14, p. 371.)

Chicago-Silverpalm, supra, is cited to us as 94 F.2d 771. *The Silver Palm* appears in 94 F.2d 754, and holds the United States at mutual fault with the private shipowner for a collision. It does not touch upon the matter here involved. *The Silver Palm (Silver Line v. United States)*, 9 Cir. 1937, 94 F.2d 776, has solely to do with limitation of liability on the Silver Palm's part. In *The Silver Palm (Silver Line v. United States)*, 9 Cir 1937, 94 F.2d 781, the appeal was from an order permitting the administrators of three deceased naval officers to proceed with their wrongful death suits. The appeal was dismissed as moot. Neither *The Silver Palm* cases, nor *The Rome* case, establish the principle claimed by appellee that "similar damages have been uniformly allowed in previous cases against the government." (Appellee's Brief, p. 10.) Nor do alleged voluntary settlements by the government establish a right specifically excluded and prohibited by an Act of Congress, as is argued in appellant's brief. However, there is authority to support the appellee's position. In *The Tampico* case (W.D.N.Y. 1942, 45 F.Supp. 174), a stevedore was injured while transferring cargo from a barge to *The Tampico*. The stevedore, who was employed by *The Tampico*'s owner, sued the barge owner claiming that the barge was defective. The barge owner impleaded the owner of *The Tampico*, claiming that it was negligent in operating a "clamshell bucket" used in transferring

cargo. The *Tampico's* owner was immune from personal injury suits by its employees, for it was covered by the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901, *et seq.* The "exclusiveness of liability" under this Act, 33 U.S.C. § 905, is similar in extent to 5 U.S.C. § 757(c). Nevertheless, the trial court held that the barge owner could obtain contribution from the owner of *The Tampico*. The *Tampico's* owner was immune from suits brought by the stevedore or anyone in his right, but "the right in admiralty to contribution between wrongdoers does not stand on subrogation but arises directly from the tort." We must note, of course, that this is a district court case, not binding on this court, and of limited precedential value.

The Tampico was cited and quoted with approval by a higher court in *Hilaffer v. Argonne Co.*, D.C.Cir. 1950, 183 F.2d 811, *cert. denied* 340 U.S. 852. In that case appellant's husband was injured during the course of his employment; his employer, as in *The Tampico*, was covered by the Longshoremen's and Harbor Worker's Compensation Act. The wife claimed that the injury to her husband had interfered with her marital relationship and she sued for loss of consortium. The court held that the action for loss of consortium does not stand on subrogation but arises directly from the tort. Thus the wife was not suing in her husband's right; she was suing in her own right and was entitled to damages for her loss. Accordingly, the court held that the wife's right to damages for loss of consortium was not barred by the Compensation Act. This case, however, was expressly overruled in 1957 in *Smithers & Company Inc. v. Coles*, D.C.Cir., 242 F.2d 220.

cert. denied 354 U.S. 914, a case heard by the District of Columbia Circuit en banc. The court noted that the right to damages for loss of consortium must be regarded as a right "flowing from" the spouse's injury:

"Whether the right of a spouse be regarded as independent, i.e., arising directly from the tort, or as derivative, that right does not come into existence except for the occurrence of the injury. Absent a compensable injury to the one spouse there would be no claim to assert against the employer." (242 F.2d 224-225.)

Expressing its disagreement with *Hitafter*, the court in *Smithers & Company Inc. v. Coles* held that all liability "flowing from" the employee's injury is governed by the Act:

"In the *Hitafter* opinion this court conceded that the 'plain and literal language' of this statute *could* be construed to bar 'any right of action flowing from the compensable injury,' but rejected that interpretation. We think the statute cannot be read any other way without doing extreme violence to those 'plain and literal' words read in the light of the purposes of the Act." (242 F.2d at 224.)

The same result had already been reached by the tenth circuit with respect to the Federal Employees' Compensation Act, the statute which is in issue here (*Underwood v. United States*, 10 Cir. 1953, 207 F.2d 862).³ The *Under-*

³We agree with the reasoning of the tenth circuit. There the court said:

"It is significant, we think, that the Congress chose to speak in terms of liability of the government, not in terms of remedies or rights of action, and in doing so, it gave a right of action only to the extent that it saw fit to relax governmental immunity from any liability." *Underwood v. United States*, 10 Cir., 1953, 207 F.2d 862, 864.

wood case received the approbation of this court in *Thol v. United States*, 9 Cir. 1954, 218 F.2d 12, 14. The *Smithers & Company Inc. v. Coles* and *Underwood* cases are, we think, persuasive authority here.⁴ In our opinion the shipowner's right of action is just as dependent upon the employee's injury as the wife's claim for loss of consortium; or to put it more precisely, the shipowner's claim is no more independent of the employee's injury than is the wife's. If, then, the policy of the statute bars the wife's action for loss of consortium, it should also bar the shipowner's action for contribution.

The authority supporting appellee's position is not so persuasive as the cases last cited above. While *The Tampico* supports appellee's cause, it was, in the eyes of one court overruled by *American Mut. Liability Ins. Co. v. Matthews*, 2 Cir. 1950, 182 F.2d 322. (See *Coates v. Poto-mac Elec. Power Co.*, D.D.C. 1951, 95 F. Supp. 779.) For this reason, appellee did not cite *The Tampico*. We cannot agree that the *Matthews* case overrules *The Tampico*. *Matthews* held only that the Longshoremen's and Harbor Workers' Compensation Act prevents the joint tortfeasor from obtaining contribution from the employer covered by the Act. This parallels the holding, under the Federal Employees' Compensation Act, in *Christie v. Powder Power Tool Corp.*, *supra*. It does not deal with the problem presented by the admiralty rule and the point raised

⁴As the District of Columbia Circuit pointed out in *Smithers*:

"[E]very court which had undertaken to construe the same or similar exclusionary clauses prior to the *Hitafer* case had arrived at a result in conflict with the decision of this court in *Hitafer*. [cases noted] Cases decided subsequent to the *Hitafer* case also followed the literal language of statutes cast in substantially the same terms." 242 F.2d 226 at 225.

by *The Tampico*, viz. that the suit based upon the admiralty rule is an independent cause of action not founded upon the injured employee's right but founded upon the employee's breach of a duty to other shipowners to exercise care in navigation. This point is involved, however, in the persuasive authority discussed above relating to a spouse's right to sue for loss of consortium. Thus, while it does not appear that *The Tampico* has been overruled, it has been robbed of its persuasiveness by subsequent developments.

Appellee places its principal reliance upon a series of cases interpreting the Harter Act, the most emphasis being placed on *The Chattahoochee*, *supra*. There a steamer and a schooner collided, both vessels being at fault. The owners of the schooner were awarded damages as bailees of the cargo, but the steamer was allowed to recoup half of the value of the cargo—even though the schooner was not liable to the cargo owners (under Section 3 of the Harter Act, 46 U.S.C. § 192). The shipowner's statutory exemption from liability did not preclude a recovery against it under the maritime rule. Thus, appellee claims, the statutory limitation upon the employer's liability to his employee should not destroy his liability under the maritime rule.

We concede that *The Chattahoochee* is strong authority in favor of appellee's position. There is, of course, the obvious distinction in the fact that *The Chattahoochee* interprets the Harter Act while we are here called upon to interpret the Federal Employees' Compensation Act. But a mere comparison of statutory phraseology will not aid in resolving the problem. The Harter Act provides cate-

gorically that the shipowner shall not be liable for losses due to faults of navigation. While this command may not be so specific as that contained in the Compensation Act, it is as clear and strong. But the language of the Harter Act must be considered in light of the judicial gloss which has been placed upon it. In *American Mut. Liability Ins. Co. v. Matthews*, *supra*, we learn (182 F.2d at 324) that "The Harter Act was not intended to affect the liability of one vessel to the other in a collision case . . ." Can the same be said with respect to the Compensation Acts? We have already seen that such Acts cut off the spouse's right to damages for loss of consortium. And there is no sound reason why a distinction should be made between such cases and the case of a shipowner seeking contribution under the admiralty rule. The Acts, in establishing the duty of the employer and in making that duty exclusive, have abolished the independent rights of third parties against the employer for the damage which the employer causes them when he wrongfully injures his employee. Thus it must be candidly admitted that while the United States once had a duty to other shipowners to navigate carefully in order not to injure its own employees, that duty has been abrogated by the Compensation Act. We hold *The Chattahoochee* is not here controlling because it deals with a different statute which has encrusted upon it a significantly different judicial history.

The policy of an Act which precludes a wife's recovery for loss of consortium also precludes a shipowner's claim for contribution from a joint tortfeasor. The judgment below is *reversed* with directions to recompute damages without any allowance for the \$16,000 paid by appellee to the injured United States employee, Ostrom.

The government raised a second issue regarding the trial court's interpretation of the rules of the sea in connection with the use of radar. Since both parties admitted the propriety of the trial court's finding of mutual fault, this issue does not bear upon the correctness of the judgment. Appellant briefed the issue only very sketchily and appellee has not briefed the issue at all. In the absence of an actual controversy with adequate briefing by both sides, this court should not be called upon to render a decision on the issue. It appears that the appellant is requesting an advisory opinion, and, of course, federal courts generally refrain from rendering such opinions. (*Muskat v. United States*, 1911, 219 U.S. 346.) We so refrain here.

Reversed with instructions.

(Endorsed) Opinion Filed Aug. 30, 1961.

Frank H. Schmid, Clerk.

FINAL DECREE, DATED JUNE 20, 1960

In the United States District Court for the Northern
District of California, Southern Division

In Admiralty

No. 27,359

Weyerhaeuser Steamship Company,
a corporation,

Libelant,

vs.

United States of America,

Respondent.

United States of America,

Cross-Libelant,

vs.

Weyerhaeuser Steamship Company,
a corporation,

Cross-Respondent.

St. Paul Fire & Marine Insurance Co.,
a corporation; Boston Insurance Co., a
corporation, and Fireman's Fund In-
surance Co., a corporation.

Intervening Libelants.

FINAL DECREE

The above entitled cause having been fully tried and decided, and the Court having heretofore made interlocutory Findings of Fact and Conclusions of Law by Memorandum Opinions filed herein, and having there-

after made Findings of Fact and Conclusions of Law as to damages,

Now, Therefore, in accordance with the aforesaid opinions, findings and conclusions,

It is finally Ordered; Adjudged and Decreed as follows:

1. Libelant Weyerhaeuser Steamship Company shall have and recover from respondent United States of America the sum of \$3,106.44, together with interest thereon at 4% per annum from date hereof.

2. The costs of libelant Weyerhaeuser Steamship Company being taxed at \$313.90, and the costs of respondent United States being taxed at \$432.26, the party having the larger amount of such costs, to wit: The United States shall recover one-half the excess thereof, to wit: \$59.18, from the other party, to wit: Weyerhaeuser SS Co., and respondent United States shall recover from libelant Weyerhaeuser Steamship Company one-half of the total costs of \$66.00, taxed against respondent United States and in favor of intervening libelants.

3. When the costs of said libelant and respondent shall have been taxed, the party having the larger amount of costs shall recover one-half the excess thereof from the other party.

4. Intervening libelant St. Paul Fire and Marine Insurance Company shall have and recover from respondent United States of America the sum of \$19,122.75, together with interest thereon at 4% per annum from date hereof, and its costs of suit, taxed at \$22.00.

5. Intervening libelant Fireman's Fund Insurance Co. shall have and recover from respondent United States of

America the sum of \$923.85, together with interest thereon at 4% per annum from date hereof, and its costs of suit, taxed at \$22.00.

6. Intervening libellant Boston Insurance Company shall have and recover from respondent United States of America the sum of \$443.54, together with interest thereon at 4% per annum from date hereof, and its costs of suit, taxed at \$22.00.

Done in open court this 17th day of June 1960.

/s/ MICHAEL J. ROCHE,
United States District Judge.

Approved as to Form:

LYNN J. GILLARD,
United States Attorney.

KEITH R. FERGUSON,
Special Assistant to the
Attorney General.

/s/ By JOHN F. MEADOWS.

DERBY, COOK, QUINBY, TWEEDT,
/s/ By STANLEY J. COOK.

GRAHAM JAMES & ROLPH,
/s/ By HENRY R. ROLPH.

[Endorsed]: Lodged June 6, 1960; Filed June 17, 1960;
Entered June 20, 1960.

Appendix B

In the United States District Court for the Eastern
District of Virginia at Alexandria

In Admiralty No. 780

**LIBEL OF TEXAS COMPANY AS OWNER OF THE TANKER
WASHINGTON AGAINST UNITED STATES OF AMERICA**

Seventh. By reason of the premises, the libelant has sustained damages, including the cost of repairs to the *Washington*, towage, loss of use and other expenses in the sum of approximately \$150,000, no part of which has been paid, although payment thereof has been duly demanded. *Claims have also been made against the libelant for damages alleged to have been suffered by reason of the loss of the lives of several members of the Armed Forces stationed on board the U.S.S. Ruchamkin. Many other claims have been made for personal injuries and loss of property suffered by reason of the aforesaid collision. If libelant is held responsible for any such claims for loss of life, personal injury or loss of property, the libelant hereby claims reimbursement therefor from the respondent.*

Eighth. Libelant elects to have this suit proceed in accordance with the principles of libels *in personam* and *in rem*.

• • •

In Admiralty No. 780

THE TEXAS COMPANY AS OWNER OF THE TANKER WASHINGTON AGAINST THE UNITED STATES OF AMERICA

Answer of the United States

The answer of cross-respondent, the United States of America, to the cross-libel of The Texas Company, originally brought as a separate libel in the Southern District of New York and transferred to this district, in a cause of collision and damage, civil and maritime, alleges on information and belief as follows:

• • •

Seventh. Denies the allegations of Article Seventh of the libel.

AFFIDAVIT

State of New York

County of New York—ss.

I, JOSEPH M. BRUSH, an attorney in the State of New York, and practicing law with the firm of Brush & Michelsen, 26 Broadway, New York 4, New York, being duly sworn, depose and say:

I served as an attorney for The Texas Company, which was the appellant and cross-appellee in the case of *United States v. The S. S. Washington*, 172 F.Supp. 905 (1959), affirmed in 272 F.2d 711 (1959), upon the opinion of the District Court.

Throughout the trial of the above-named case in the District Court, the issue of The Texas Company's right to include death and injury payments made to servicemen and their survivors in its collision damage claim against the Government of the United States was never admitted by the attorneys for the United States. United States, in fact, throughout the trial of this case, positively refused to stipulate their assent to include these damages. The point thus remained in issue, being raised by Count VII of the libel of The Texas Company and denied in the Government's answer. This issue was resolved in Judge Bryan's opinion.

JOSEPH M. BRUSH

Subscribed and sworn to before me on this 25th day of September, 1961, in the City of New York, New York.

(Seal)

IRENE K. McDERMOTT

Notary Public, State of New York
No. 60-7814800

Qualified in Westchester County
Cert. Filed with N. Y. Co. Reg.
Commission Expires March 30, 1962

*In the United States Court of Appeals
for the Fourth Circuit*

No. 7191

United States of America, Owner of the USS Ruchamkin
Appellant, Cross-Appellee,

v.

SS Washington, Her Engines, etc., The Texas Company etc.,
Appellee, Cross-Appellant,

v.

Parley Bright, Administrator, et al., Appellees

On Appeal from the United States District Court for the
Eastern District of Virginia

BRIEF AND APPENDIX FOR THE UNITED STATES

STATEMENT OF THE CASE AND QUESTIONS INVOLVED

These appeals by the United States and The Texas Company arise out of the collision off the Virginia capes on November 14, 1952 between the *SS Washington*, owned by the Texas Company, and the *USS Ruchamkin*, a Navy destroyer. On prior appeals by the United States and by the claimants asserting death claims against Texas, this Court (241 F. 2d 819, certiorari denied, 355 U.S. 817), reversing in part a decree of the district court (141 F. Supp. 97), held that the *Ruchamkin* and the *Washington*

were both at fault. On remand, District Judge Bryan, on March 10, 1959, determined that the estates of four servicemen, who died as a result of the collision, recover from Texas an aggregate of \$112,000 (App. 27). The court decreed that the awards against Texas are includable as part of The Texas Company's collision damage and that Texas recover over one-half the awards (\$56,000) as contribution from the United States (App. 28). The court further held that the United States was not entitled to offset against The Texas Company's right of contribution, statutory death benefits and compensation paid and payable by the United States to the surviving dependents of the deceased service personnel.

This appeal by the United States from the decree of March 10, 1959 presents the following questions:

1. *Whether the district court erred in holding that The Texas Company was entitled to contribution from the United States for one-half its liability for the wrongful death of the service personnel who died as a result of the collision of November 14, 1932.*

2. *If the United States is liable to The Texas Company, whether the district court erred in refusing to consider, by way of mitigation or offset of the Government's liability, death benefits and compensation paid and payable to the dependents of the deceased service personnel.*

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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 674

WEYERHAEUSER STEAMSHIP COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE NINTH CIRCUIT**

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the district court (Pet. App. i) and the supplemental opinion (Pet. App. x) are reported, respectively, at 174 F. Supp. 663 and 178 F. Supp. 496. The opinion of the Court of Appeals for the Ninth Circuit (Pet. App. xii) is reported at 294 F. 2d 179.

JURISDICTION

The judgment of the court of appeals was entered on August 30, 1961. A timely petition for rehearing, filed on September 29, 1961, was denied on October 24, 1961. The petition for a writ of certiorari was filed on January 19, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the exclusivity provision of the Federal Employees' Compensation Act precludes petitioner from recovering from the United States one half of its tort liability to a government employee injured in the mutual fault collision between petitioner's vessel and the government vessel.

STATUTES INVOLVED

The Federal Employees' Compensation Act, 5 U.S.C. 751, *et seq.*, provides in pertinent part (as it appears in the United States Code):

5 U.S.C. 751(a)—The United States shall pay compensation as hereinafter specified for the disability or death of an employee resulting from personal injury sustained while in the performance of his duty, but no compensation shall be paid if the injury or death is caused by willful misconduct of the employee or by the employee's intention to bring about the injury or death of himself or of another, or if intoxication of the injured employee is the proximate cause of the injury or death.

5 U.S.C. 757(b)—The liability of the United States or any of its instrumentalities under sections 751-756, 757-781, 783-791, and 793 of this title or any extension thereof with respect to the injury or death of an employee shall be exclusive, and in place, of all other liability of the United States or such instrumentality to the employee, his legal representative, spouse, dependents, next of kin, and anyone otherwise entitled to recover damages from the United States or such instrumentality, on account of such injury

or death, in any direct judicial proceedings in a civil action or in admiralty, or by proceedings, whether administrative or judicial, under any other workmen's compensation law or under any Federal tort liability statute * * *.

STATEMENT

This is a suit in admiralty brought in the United States District Court for the Northern District of California on cross-libels by petitioner and the United States arising out of a collision between the petitioner's vessel, the SS F. E. WEYERHAEUSER and the United States Army Dredge PACIFIC off the coast of Oregon (R. 3, 16).¹

The only personal injury arising out of the collision was to Reynold Ostrom, a civil service employee of the government serving aboard the PACIFIC; he was within the coverage of the Federal Employees' Compensation Act, 5 U.S.C. 751, *et seq.* Ostrom collected \$329.01 from the United States under the provisions of that Act as compensation for his injury (R. 72). Ostrom then filed a separate action against petitioner to recover general damages for his injuries (R. 73). In that suit, which was commenced in a Washington state court and removed to the United States District Court for the Western District of Washington, petitioner moved to implead the United States, seeking indemnity or contribution from the government for any amounts which petitioner might be held liable to pay to Ostrom. This motion was denied (R. 105-

¹ Cargo insurers filed a libel in intervention against the United States (R. 23).

106). Subsequently, Ostrom and petitioner settled their suit for \$16,000, and the United States stipulated that this was a reasonable settlement (R. 68).² Subsequently, Ostrom reimbursed the United States for the \$329.01 paid as compensation.

In the present case, in its decision on liability entered on July 2, 1959, the district court found that the collision was caused by the mutual fault of the two vessels (R. 63). The court also held that each party was entitled to recover from the other one-half of all provable damages and court costs sustained as a result of the collision, according to the admiralty law in cases of mutual fault collisions (R. 63).

Thereafter, the parties entered into a stipulation respecting the amount of damages, and the only real issue remaining was whether in apportioning damages the United States must contribute to petitioner's settlement with Ostrom (R. 69). The district court held that the \$16,000 paid by petitioner in settlement of Ostrom's claim was an item of provable damage to which the United States must contribute in the overall apportionment of damages (R. 73).

On the government's appeal, the court of appeals reversed and remanded with directions to recompute damages without any allowance for the \$16,000 paid on Ostrom's claim (Pet. App. xxv). This decision was rested upon the court's construction of 5 U.S.C. 757(b), *supra*, pp. 2-3, by which the government's liability to pay compensation to its employees is made exclusive.

² All other defenses and claims of petitioner and the United States were reserved.

ARGUMENT

The decision of the court of appeals is not in conflict with the decisions of this Court or of other courts of appeals. On the contrary, this is the first appellate construction of the exclusivity provision in the Federal Employees' Compensation Act in terms of its application to a third-party claim against the government arising out of a mutual fault collision at sea resulting in injury to a government employee aboard a government vessel. In view of the plain terms and purpose of the Compensation Act, the decision below is correct and there is no occasion for further review by this Court.

1. On the basis of the language of the Federal Employees Compensation Act, the Congressional intent and policy of the statute, and decisions construing the comparable provisions of the analogous Longshoremen's and Harbor Workers' Act, 33 U.S.C. 905 (all of which the court below considered), the decision in this case is correct.

(a) It has been established by this Court that the Federal Employees' Compensation Act is the exclusive remedy for civilian seamen in the employ of the United States injured in the performance of duty on government vessels. *Patterson v. United States*, 359 U.S. 495; *Johansen v. United States*, 343 U.S. 427. See also *Posegate v. United States*, 288 F. 2d 11 (C.A. 9); *Smither & Co., Inc., v. Coles*, 242 F. 2d 220 (C.A. D.C.), certiorari denied, 354 U.S. 914; *Underwood v. United States*, 207 F. 2d 862 (C.A. 10); *Sasse v. United States*, 201 F. 2d 871 (C.A. 7); *Lewis v. United*

States, 190 F. 2d 22 (C.A.D.C.). By the express terms of that Act (5 U.S.C. 757(b)), the compensation payable to the employee is "exclusive, and in place, of all other liability of the United States * * * to the employee * * * and anyone otherwise entitled to recover damages from the United States * * * on account of such injury or death, * * * under any Federal Tort liability statute." *supra*, pp. 2-3.³ This statutory language precludes not only direct tort liability by the United States for the injuries of a government employee but also indirect liability through a third person. To avoid doing violence to the specific words Congress used, the statute must be read as barring *any* right flowing from the compensable injury. *Smither & Co., Inc. v. Coles*, 242 F. 2d at 224 (C.A.D.C.). Moreover, the policy and purpose of statutory compensation schemes is, as stated by this Court in *Bradford Electric Co. v. Clapper*, 286 U.S. 145, 159, to provide "not only for employees a remedy which is both expeditious and independent of proof of fault, but also for employers a liability which is limited and determinate." A holding which would permit petitioner to recover would depart from the language of the Federal Employees' Compensation Act and subvert its purpose and policy.

³ This section was enacted in 1949 as an amendment to the Federal Employees' Compensation Act for the purpose of making it clear "that the right to compensation benefits under the act is exclusive and in place of any and all other legal liability of the United States or its instrumentalities * * *" S. Rep. No. 836, 81st Cong., 1st Sess., p. 23. (Emphasis added.)

(b) To our knowledge *Christie v. Powder Power Tool Corp.*, 124 F. Supp. 693 (D. D.C.), is the only reported decision denying, on the basis of Section 757 (b) of the Federal Employees' Compensation Act, a third-party claim for contribution, but the authorities under Section 5 of the Longshoremen's and Harbor Workers' Act, 33 U.S.C. 905, which is virtually identical to Section 757(b) of the Federal Employees' Compensation Act,⁴ preclude recovery from the employer in similar circumstances on the ground that a third-party tortfeasor's claim against an employer for contribution is barred by Section 5.⁵ The decisions point out that the employer surrenders his right to utilize common law defenses and in return gains an absolute, but limited, liability to his injured employee in the place of possible liability without limitation. As succinctly put

⁴Section 5 of the Longshoremen's Act provides in pertinent part that "the liability of an employer [for compensation] shall be exclusive and in place of all other liability * * * to the employee * * * and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death."

⁵See *Brown v. American-Hawaiian SS Co.*, 211 F. 2d 16 (C.A. 3); *Crawford v. Pope & Talbot*, 206 F. 2d 784 (C.A. 3); *Lo Bue v. United States*, 188 F. 2d 800 (C.A. 2); *American Mutual Liability Ins. Co. v. Matthews*, 182 F. 2d 322 (C.A. 2); *Baird v. John McShain, Inc.*, 108 F. Supp. 553 (D. D.C.); *Coates v. Potomac Elec. Power Co.*, 95 F. Supp. 779 (D. D.C.); *Liberty Mut. Ins. Co. v. Vallendingham*, 94 F. Supp. 17 (D. D.C.); *Johnson v. United States*, 79 F. Supp. 448 (D. Ore.); *Standard Wholesale Phosphate & Acid Works, Inc. v. Ruckert Terminal Corp.*, 193 Md. 20, 65 A. 2d 304; and see 2 Larson, *Workmen's Compensation Law*, § 76.21; 53 A.L.R. 2d 977.

by the Second Circuit in *American Mutual Liability Ins. Co. v. Matthews, supra* (182 F. 2d at 324):

To impose a non-contractual duty of contribution on the employer is *pro tanto* to deprive him of the immunity which the statute grants him in exchange for his absolute, though limited, liability to secure compensation to his employees.

The similarity in the language and purpose of the Longshoremen's Act and the Federal Employees Compensation Act require that the result reached in the cases under Section 5 of the Longshoremen's Act should also obtain here.

2. The fact that this is an admiralty case in which the rule of divided damages applies does not mean that the exclusivity provision of the Compensation Act must be disregarded. The rule of divided damages is still applicable to the mutual fault collision between petitioner's vessel and that of the government, but what the court below decided is that, in arriving at the total damages to be divided, petitioner cannot include as an element an amount representing its tort liability to an employee of the government subject to the Federal Employees' Compensation Act. Contrary to petitioner's argument, this decision is in no way inconsistent with the ruling in *The Thekla*, 266 U.S. 328. That case, which arose before the passage of either of the Suits in Admiralty Act* or the Public

* 46 U.S.C. 741, *et seq.*

Vessels Act⁷ was concerned with the question whether any affirmative relief could be had against the United States in a mutual fault collision. That point is not in issue here. Neither in the *Thekla*, nor in any other case cited by petitioner, is there anything to indicate that Congress does not have the power to limit the government's liability for the injury or death of its employees to the amount specified in the Compensation Act, and to provide that neither directly nor indirectly shall the government be liable for any greater amount on a claim growing out of such injury. To the extent that the position of the court of appeals may be said to rest upon concepts of sovereign immunity (Pet. App. xix), it is solely with relation to the express provisions of the Compensation Act which limit what might otherwise be the suability and liability of the United States in admiralty.

Petitioner argues (Pet. 7), however, that it was the intent of the Public Vessels Act, 46 U.S.C. 781, *et seq.*, that the United States be liable just as a private ship owner under admiralty principles, and since private ship owners must contribute to personal injury payments in collision cases, the government should also be so liable, notwithstanding the contrary provisions of the Federal Employees' Compensation Act. This would create an exception to the compensation statute in maritime tort cases, although the language of the Compensation Act permits of no exception. In specific terms, 5 U.S.C. 757(b) precludes the imposition of liability on the United States "under

⁷ 46 U.S.C. 781, *et seq.*

any Federal Tort Liability statute"—including the Public Vessels and Suits in Admiralty Acts. And as this Court held in *Johansen v. United States*, 343 U.S. 427, 441, Congress "should not be held to have made exceptions [to the Federal Employees' Compensation Act] without specific legislation to that effect,"⁸

3. The decisions of this Court upon which petitioner relies in an effort to show a conflict are inapposite. Petitioner acknowledges (Pet. 11) that this Court's ruling in *Ryan Stevedoring Co., Inc. v. Pan-Atlantic Steamship Corp.*, 350 U.S. 124, turned upon an express contract, but the petition appears to imply that, with respect to the two remaining cases cited,⁹ there was no contractual relationship between the parties. This is not correct. The recovery permitted to the third party from the employer was in all three cases based on an indemnity theory resting upon a contractual right.

Likewise, petitioner's reliance (Pet. 13) upon the Court's decisions in the Harter Act¹⁰ cases is misplaced. In *The Chattahoochee*, 173 U.S. 540, the Court held that in a mutual fault collision the cargo-carrying vessel must share the non-carrying vessel's

⁸ By the same token, petitioner's assertion (Pet. 8) that the Compensation Act is to be construed as barring only claims by the employee (and his dependents) must fail. The cases cited by petitioner on this point (Pet. 9) were decided under state laws and permitted recovery against the employer by third persons on an indemnity theory.

⁹ *Weyerhaeuser Steamship Co. v. Nacirema Operating Co., Inc.*, 355 U.S. 563, and *Crumady v. The Joachim Hendrik Fisser*, 358 U.S. 423.

¹⁰ 46 U.S.C. 190, *et seq.*

liability for cargo damage, notwithstanding a provision of the Harter Act (46 U.S.C. 192) which relieved the carrying vessel from liability for loss or damage to cargo due to errors in navigation or management of the vessel. As the court below noted in its opinion (Pet. App. xxv), the clear distinction is that the Harter Act was not intended to affect the liability of one vessel to another in a collision case. The rule of *The Chattahoochee* is therefore inapplicable where, as here, the statute makes the exclusive liability of the employer that of paying compensation to its employee, and specifically excludes liability to anyone else who might otherwise be entitled to recover from the United States. See *American Mutual Liability Ins. Co. v. Matthews*, 182 F. 2d 322 (C.A. 2), *supra*.

Neither is there validity in petitioner's contention that there is a true conflict with *United States v. The SS Washington*, 172 F. Supp. 905 (E.D. Va.), affirmed, 272 F. 2d 711 (C.A. 4), on the district court's opinion. Petitioner's claim—that the argument advanced by the United States in the instant case was rejected by the Court of Appeals for the Fourth Circuit in the *Washington* case—is inaccurate. The critical question in the earlier case was not one of contribution, but whether the government could offset, against the claim of the Texas Company, veterans' benefits paid to survivors of soldiers killed in the collision between the U.S.S. RUCHAMKIN and SS WASHINGTON. This is clear from the first paragraph of Judge Bryan's

opinion in which he states the issues before him (172 F. Supp. at 907);

The questions now before the court * * * are * * * (d) whether against the *admitted right of The Texas Company to reimbursement from the Government for one-half of the death awards as collision damages*, the United States may offset the sums paid and payable by the Government to the decedents' dependents as statutory death gratuities, indemnity and compensation. [Emphasis added]^c.

Thus, the right of the Texas Company to contribution was, in the circumstances of that case, admitted in the trial court.

Furthermore, the veterans' benefits statutes there involved did not contain a provision like 5 U.S.C. 757(b), which in very specific terms makes the liability of the government exclusively one to pay compensation. It is obvious, therefore, that the district court in the *Washington* case cannot be said to have rejected the government's position or arguments in the instant case, which rest so largely on the exclusivity provision of 5 U.S.C. 757(b).

It is true that in the *Washington* case, in the court of appeals, the United States sought to raise the issue as to whether, in the light of *Feres v. United States*, 340 U.S. 135, and *Patterson v. United States*, 359 U.S. 495, the Texas Company had any right to fix upon the United States one-half of its liability to the death claimants. This argument was made in the face of the apparent admission in the trial court that the Texas Company was entitled to reimbursement from the United States for one-half the death awards.

See *supra*, pp. 11-12. In all probability, the failure properly to raise this issue in the district court explains the affirmance on the opinion of the district court, which, as we have noted, was concerned only with the government's right of set-off.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1962

No. **674**

65

WEYERHAEUSER STEAMSHIP COMPANY,
Petitioner,

VS.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals
for the Ninth Circuit

BRIEF FOR PETITIONER

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1962

No. 674

WEYERHAEUSER STEAMSHIP COMPANY,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

**On Writ of Certiorari to the United States Court of Appeals
for the Ninth Circuit**

BRIEF FOR PETITIONER

This case comes before the Court on writ of certiorari issued to review a final judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the United States District Court for the Northern District of California, Southern Division is re-

ported at 174 F. Supp. 663 (1959) and supplemented at 178 F. Supp. 496 (1959). The opinion of the United States Court of Appeals for the Ninth Circuit (R. 148-160) is reported at 294 F. 2d 179 (1961).

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on August 30, 1961. A timely petition for rehearing, filed on September 29, 1961, was denied on October 24, 1961. The petition for a writ of certiorari was filed on January 19, 1962 and granted on March 5, 1962. The jurisdiction of this Court is invoked under 28 USC 1254(1).

QUESTION PRESENTED

Is the historic and established admiralty rule of divided damages in mutual fault collisions to be altered for the first time by a federal compensation statute?

STATUTE INVOLVED

The Federal Employees' Compensation Act, 5 U.S.C. 751, *et seq.*, provides in pertinent part (as it appears in the United States Code):

5 U.S.C. 751(a)—The United States shall pay compensation as hereinafter specified for the disability or death of an employee resulting from personal injury sustained while in the performance of his duty, but no compensation shall be paid if the injury or

death is caused by willful misconduct of the employee or by the employee's intention to bring about the injury or death of himself or of another, or if intoxication of the injured employee is the proximate cause of the injury or death.

5 U.S.C. 757(b)—The liability of the United States or any of its instrumentalities under sections 751-756, 757-781, 783-791, and 793 of this title or any extension thereof with respect to the injury or death of an employee shall be exclusive, and in place, of all other liability of the United States or such instrumentality to the employee, his legal representative, spouse, dependents, next of kin, and anyone otherwise entitled to recover damages from the United States or such instrumentality, on account of such injury or death, in any direct judicial proceedings in a civil action or in admiralty, or by proceedings, whether administrative or judicial, under any other workmen's compensation law or under any Federal tort liability statute * * *.

STATEMENT

On September 8, 1955, the Liberty Ship SS F. E. WEYERHAEUSER, owned by petitioner, and the Army Dredge PACIFIC, owned by the Corp of Engineers of the United States Army, collided. (R. 5, 6) After the filing of cross-litigations (R. 3, 16) in the United States District Court for the Northern District of California, the District Court found both vessels were to blame and according to the settled admiralty doctrine, ordered that each vessel was entitled to recover from the other one-half of all provable damages and court costs. (R. 71-78)

As a result of this collision Reynold E. Ostrom, a civil service employee of the United States employed on board the PACIFIC sustained personal injuries. (R. 72) Ostrom was an "employee of the United States" within the coverage of the Federal Employees' Compensation Act, 5 USC 751, *et seq.* (R. 72) He received \$329.01 as statutory compensation for his injury (R. 72) and then filed a separate action against petitioner in a Washington state court to recover general damages for his injuries. That suit was removed to the United States District Court for the Western District of Washington. (R. 73) Petitioner's motion to implead the United States in that action under the provisions of Rule 14 of the Federal Rules of Civil Procedure was denied for lack of jurisdiction. (R. 105-107) This action was subsequently settled by petitioner by the payment of \$16,000 to Ostrom, which amount was stipulated to be reasonable by the United States. (R. 68) Ostrom then reimbursed the United States the full compensation payment of \$329.01.

The \$16,000 paid by petitioner to Ostrom was specifically held by the district court, with the government protesting, to be a proper item of the damages to be divided pursuant to the accepted admiralty formula. (R. 74) The Government protested the inclusion of the item in a Motion for Rehearing, which was limited to that matter. (R. 79) After denial of rehearing (R. 92), the United States sought review in the Court of Appeals for the Ninth Circuit. On August 30, 1961 the Court of Appeals reversed and remanded the case to the District Court with directions to recompute damages without allowance for the \$16,000 paid by petitioner to Ostrom. (R. 160) A

timely Petition for Rehearing was filed by petitioner on September 29, 1961 and denied on October 24, 1961 by the Court of Appeals. (R. 161) Petitioner thereupon applied pursuant to 28 USC 2101(f) for stay of mandate upon the decision in order to seek review of the matter by this Court. On December 26, 1961 the Court of Appeals for the Ninth Circuit ordered mandate stayed pending the disposition of a Petition for Certiorari. Certiorari was granted by this Court on March 5, 1962. (R. 161)

SUMMARY OF ARGUMENT

Congress has expressed its clear intent that the Government be liable for its maritime torts as a private shipowner, Public Vessels Act of 1925, 46 USC 790 *et seq.*, and it is conceded that the settlement paid by Petitioner to Ostrom would under the accepted divided damages rule be an element of damages to be shared by both vessels.

The Government seeks to create an exception to the moiety rule by reason of the so-called "exclusive liability" section of a workmen's compensation statute—legislation which purports to deal only with the relationship of employer and the employee together with his immediate relatives and whose legislative history reveals not a shred of evidence that Congress intended to abrogate existing third party rights.

Decisions of this Court interpreting the nearly identical "exclusive liability" provision of the Longshoremen's and Harbor Workers' Compensation Act, 33 USC 905, have found that third party rights remain unaffected. *Ryan*

Stevedoring Company, Inc. v. Pan-Atlantic Steamship Corporation (1956) 350 US 124; *Weyerhaeuser Steamship Company v. Nacirema Operation Company, Inc.* (1958) 355 US 563; *Crumady v. The Joachim Hendrick Fisser* (1959) 358 US 423. The fact that this Court found a contractual relationship between the parties in *Ryan* and the cases following it should in no way alter the result here where disallowance of inclusion of the Ostrom settlement would subject the American merchant fleet to potentially enormous liability without recourse to recover from an equally negligent Government vessel.

ARGUMENT

I. CONGRESS DID NOT INTEND BY REASON OF FECA SECTION 757(b) TO MAKE A THIRD PERSON UNFORTUNATE ENOUGH TO INJURE A BENEFICIARY OF THE FECA THE GRATUITOUS STATUTORY INDEMNITOR OF THE BENEFICIARY'S WRONGDOING EMPLOYER.

1. The words of the statute do not preclude the Government's liability to third persons after paying compensation to the employee.

The language of the statute itself is the foremost guide to legislative intention, *U. S. v. American Trucking Association* (1940) 310 U.S. 534, 543, n. 18; *Schweigmann Bros. v. Calvert Distillers Corp.* (1951) 341 U.S. 384, 390-395. The Court of Appeals for the Ninth Circuit assumes in its opinion¹ that Section 757(b) was intended by Congress to affect the Government's relations to third parties. Applying accepted rules of statutory construction, that assumption is unwarranted.

¹"To allow a third party recovery against the United States on any ground is subversive of the statute limiting the liability of the United States." 294 F. 2d at 181.

Section 757(b) provides that the statutory compensation remedy shall be exclusive with respect to the liability of the employer "to the employee, his legal representative, spouse, dependents, next of kin, and anyone otherwise entitled to recover damages from the United States" The specific categories enumerated by the statute are thus the employee, his relatives and his dependents. Respondent seeks to apply the general words "anyone otherwise entitled to recover damages" to a person (such as a private shipowner) seeking to recover after a both-to-blame collision—a matter clearly unconnected with the employer's relationship with his workers and their families. Under customary rules of statutory construction the general term "anyone otherwise entitled to recover damages" cannot be given a content totally unrelated to the classes especially mentioned by the statute.² Ordinarily "general terms which follow a specific one [are limited] to matters similar to those specified." *Gooch v. U.S.* (1936) 297 U.S. 124, 128; *F. W. Filch Company v. U. S.* (1945) 323 U.S. 582, 586; *In Re Bush Terminal Company* (2nd Cir. 1938) 93 F. 2d 659, 660; *Hampton Road Industrial Electronics Corporation v. U. S.* (1959) 178 F. Supp. 474, 477.

By the use of the word "direct" in modifying "judicial proceedings" in Section 757(b), it is clear that Congress intended the section to operate as a shield for the employer only in regard to damage actions instituted by the class of persons enumerated by the statute. Unless the phrase "direct judicial proceedings" is interpreted to

² Larson, *The Law of Workmen's Compensation*, Section 76.30, p. 235.

apply to actions initiated by the employee, his dependents or relatives, "direct" would be meaningless.

As stated in the *F. W. Fitch Company v. U. S.* opinion *supra*, the *eiusdem generis* rule should not be applied where it defeats the obvious purpose of the legislation. It clearly would not in the instant action. The FECA deals with the relationship of employer with his employees. The scheme of this statute—as is true with workmen's compensation statutes in general—is to provide a guaranteed compensation to the injured employee from his employer regardless of the fault of the employee. The *quid pro quo* to the employer is limited liability. The third party—the shipowner—has received nothing and should not be held to have given up the right in this instance to receive one-half of all his provable damages—his right absent the statute.³

³Professors Hart and Sacks of the Harvard Law School have written the following with regard to the argument that Section 5 of the Longshoremen's and Harbor Workers' Act precludes all third party recovery, the argument of the Government herein with regard to the nearly identical section of the FECA:

"The national legislature, we are asked to suppose, made a deliberate decision that the third person—when there was one—should be left holding the bag for both employer and employee. In pursuance of a congressional purpose to sweeten up the *quid pro quo* even for negligent employers, the third person was to be deprived of the right to contribution which the principals of the pre-existing general law kindly gave him, with no *quid* in return for his *quo* whatever and this wish to be accomplished *inter alia*, by presenting the legal world with the theretofore unheard of spectacle of the negligent plaintiff recovering from his co-tortfeasor not merely half his damages—but the whole of them—on the excuse that a surplus might be produced which would benefit the plaintiff's employee." Hart and Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* (Unpublished Tentative Ed. in Harvard Law School Library (1958), p. 529).

2. Legislative history of Section 757(b) reveals the absence of an intent by Congress to alter existing rights of third parties.

This Court has previously considered the 1949 amendments to the FECA, among which is Section 757(b). *Johansen v. U. S.* (1954) 345 U.S. 427, 438. The decision in *Johansen* was that Congress in Section 757(b) intended to work no alteration in existing remedies of seamen because the seaman had not had an opportunity to be heard during Congressional consideration of the amendments. Senator Douglas, the committee's spokesman for the bill on the floor of the Senate, was quoted to the same effect. As a result this Court held that the intent of Congress was to leave the law respecting seamen's remedies as it existed prior to the passage of the 1949 amendments.⁴ Similarly, petitioner respectfully submits that this Court should find that third party rights arising out of mutual fault collisions were not intended to be affected by these amendments. Petitioner has searched the committee hearings and congressional debates without finding a shred of evidence indicating Congressional interest or intent in a literal interpretation of the phrase "the liability of the United States . . . shall be exclusive." Every indication is that the House and Senate committees and Congress itself intended to affect only the rights of employers vis-a-vis employees.⁵

⁴"If the remedy of compensation was exclusive prior to the passage of the 1949 amendment, it is exclusive now." 343 U.S. at 438.

⁵The 1949 amendments to the FECA were embodied in S. 1287 and H.R. 3191, both considered by the 81st Congress, 1st Session. Hearings were held before the Special Subcommittee of the Committee on Education and Labor of the House of Representatives at Washington on April 11, 12, 13 and May 2, 1949. The Committee reports on the companion bills are reprinted in U.S. Code Cong. Service, 81st Congress, 1st Session, 1949, Vol. 2, pp. 2125-2143.

The bill originally drafted and considered by the subcommittee of the House Education and Labor Committee contained the following Section 757(b):

(b) The remedy afforded to any person under the act with respect to his own injury or the death of another individual shall, unless otherwise specifically provided by law, be the exclusive remedy against and be in place of any other legal liability of the United States or any of its instrumentalities wholly owned by it, on account of such injury or death, where such liability is determinable by direct judicial proceedings at law, in admiralty, or by proceedings under any workmen's compensation law or under any other federal tort liability statute, 95 Cong. Rec. 8759.

The committee recommended to the House that the phrase "unless otherwise specifically provided by law" be stricken. 95 Cong. Rec. 8761. The only reasonable interpretation of this revision, which was accepted by the House on passage of the bill, is that the committee considered the "exclusivity" provision too broad and did not wish the burden of establishing the survival of existing rights and remedies to be on the party asserting them.

The proposed amendments to the FECA in the form adopted by the House reached the Senate for consideration as S. 1287. The Senate Committee on Labor and Public Welfare reported the bill favorably with the following revision to Section 757 (b), which was accepted by the Senate and subsequently adopted by the House:

(b) The liability to the United States or any of its instrumentalities under this act or any extension thereof with respect to the injury or death of an employee shall be exclusive, and in place, of all other

liability of the United States or such instrumentality to the employee, his legal representative, spouse, dependents, next of kin, and anyone otherwise entitled to recover damages from the United States or such instrumentality, on account of such injury or death, in any direct judicial proceedings in a civil action or in admiralty, or by proceedings, whether administrative or judicial, under any other workmen's compensation law or under any federal tort liability statute.

In summary, the original House draft of this section limited its application only by the phrase "to any person." The revision by the Senate defined and limited the class of persons to whom the section was to apply to the employee and his beneficiaries. The Senate committee revision was accepted by the Senate and concurred in by the House on October 6, 1949. 95 Cong. Rec. 14059.* The Senate Report on the measure as enacted (Report No. 836, 81st Congress, 1st Session, Report to Accompany HR 3191) discusses the technical amendments, including Section 757(b), in a manner that confirms that the only intent of Congress was to affect the relationship between employer and employee together with the employee's beneficiaries. Although the report states that "needless and expensive litigation will be replaced with measured justice" (at page 23), no hint is given that the rights of third parties were intended to be changed by this section. The report states:

Since the proposed remedy would afford *employees and their dependents* a planned and substantial pro-

*See Appendix A for text of Senate debate regarding adoption of S. 1287.

tection, to permit other remedies by civil action or suits would not only be unnecessary, but would in general be uneconomical, from the standpoint of both the *beneficiaries* involved and the Government. (Emphasis added)⁷

The clear import of this statement is that the Committee felt it was dealing with persons in an employer-employee relationship and no others.

II. CONGRESSIONAL POLICY EXPRESSED IN THE PUBLIC VESSELS ACT IS VIOLATED BY DENYING PETITIONER'S RIGHT TO INCLUDE THE OSTROM SETTLEMENT IN THE COLLISION DAMAGES TO BE DIVIDED.

Congressional policy with regard to the liability of the United States Government for maritime torts was clearly and definitively expressed in Public Vessels Act of 1925, 46 USC 781 *et seq.* The intent of that statute was that the United States be liable *in rem* and *in personam* just as a private shipowner when government ships tortiously cause personal injury or property damage. *Canadian Aviator Limited v. United States of America* (1945) 324 U.S. 215. In *United States v. Shaw* (1940) 309 U.S. 495, this Court affirmed the inapplicability of sovereign immunity as a shield for the United States in both-to-blame collisions.

The language of the opinion below clearly indicates that the Court of Appeals for the Ninth Circuit intended to place the burden on petitioner to show that Congress in

⁷U.S. Code Cong. Service, 81st Congress, 1st Session, 1949, Vol. 2, p. 2136.

Section 757(b) of FECA did *not* intend to alter the clear policy expressed in the Public Vessels Act of 1925. In its opinion, the Court states:

We do not presume that if there never had been a retreat by the United States from its absolute non-liability as a sovereign, appellee could or would here maintain that such claim of sovereignty was inferior to the right established by admiralty law, no matter how ancient, simply because unfair to the shipowner. . . . But can a limited waiver of sovereign immunity be enlarged by indirection, i.e. through the negligent act of a third party—the shipowner? We think not.*

Petitioner respectfully submits that this statement of the Court of Appeals ignores both the legislative policy of Congress expressed in the Public Vessels Act of 1925 and the decisions of this Court pre-dating that legislation.

Decisions of this Court established the liability of the United States to share damages after a both-to-blame collision involving a government vessel prior to the passage of the Public Vessels Act of 1925. Mr. Justice Holmes in *The Western Maid* (1922) 257 U.S. 419 in his majority opinion held that the sovereign immunity of the United States prevented any affirmative relief for private vessels so unfortunate as to be in collision with a vessel owned by the United States government. In *The Thetla* (1924) 266 U.S. 328, however, Mr. Justice Holmes for the majority reversed his prior opinion and specifically held the United States subject to affirmative relief in both-to-blame collisions. Subsequent to that decision, Congress passed the Public Vessels Act of 1925, which affirmed that Con-

*294 F. 2d at 182.

gress intended to place the government in the same position as the private shipowner with regard to liability for damages in maritime collisions.

Petitioner respectfully submits that permitting the private shipowner to recover from the Government one-half of the settlement paid to Ostrom would have the effect of affirming congressional policy and the decisions of this Court and is in no way enlarging "by indirection" a limited waiver of sovereign immunity.⁹ The legislative policy of Congress that the government should be liable for maritime torts, just as a private shipowner, should not be abrogated without an equally clear expression of a congressional change of mind. The burden should be placed on the government to show that change of mind. As previously discussed, the words of Section 757(b) of the Federal Employees' Compensation Act purport to deal with the relationship of employer and employee and the legislative history of the amendments of 1949 show absolutely no congressional intent to amend the rights of third parties.¹⁰

⁹294 F. 2d 182.

¹⁰The Court of Appeals for the Third Circuit in *Drake v. Treadwell Construction Co.* (1962) 299 F. 2d 789 has, like the Court below, without examining the legislative history or policy of the statute found Section 757(b) of the FECA to have abolished existing third party rights.

**III. PREVIOUS DECISIONS OF THIS COURT HAVE HELD THAT
"EXCLUSIVE LIABILITY" PROVISIONS OF FEDERAL
COMPENSATION LEGISLATION DO NOT BAR RECOVERY
BY A THIRD PARTY AGAINST A NEGLIGENT EMPLOYER.**

Section 5 of the Longshoremen's and Harbor Workers' Compensation Act, 33 USC 905 *et seq.*, is nearly identical to Section 757(b) of the Federal Employees' Compensation Act and provides:

The liability of an employer prescribed in Section 4 [for compensation] shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death . . .

In *Ryan Stevedoring Company, Inc. v. Pan-Atlantic Steamship Corporation* (1956) 350 US 124, this Court held that where injuries to a longshoreman-employee occurred through some fault of his employer, the third party shipowner has a right to receive full reimbursement from the stevedoring employer, regardless of the existence of the "exclusive liability" provision of the Longshoremen's and Harbor Workers' Compensation Act. This Court affirmed the *Ryan* holding in *Weyerhaeuser Steamship Company v. Nacirema Operation Company, Inc.* (1958) 355 US 563, and in *Cramady v. The Joachim Hendrick Fisser* (1959) 358 US 423. These decisions refute the government's position that a literal reading of the "exclusive liability" provision of the FECA is justified. Equally in error is the statement by the Court of Appeals in its decision below, which concluded:

The [Longshoremen's and Harbor Workers' and the Federal Employees' Compensation] Acts, in establishing the duty of the employer and in making that duty exclusive, have abolished the independent rights of third parties against the employer for the damage which the employer causes them when he wrongfully injures his employee.¹¹

The decisions of this Court in *Ryan*,¹² *Nacirema*¹³ and *Crumady*¹⁴ have carefully considered the language of the "exclusive liability" provision of the Longshoremen's and Harbor Workers' Act and found that it must be given a meaning consistent with the policy of the statute and the class of persons defined by the statute as beneficiaries. It is also significant that state courts interpreting comparable "exclusive liability" provisions of state compensation acts have nearly universally held that the rights of third parties are not affected by such provisions.¹⁵

The decisions of this Court in the compensation cases cited emphasized that the third party was granted recovery against the negligent employer because the two were in a contractual relationship. In *Ryan v. Pan-Atlantic Steamship Corporation*, this Court stated that "because respondent in the instant case relies entirely upon peti-

¹¹294 F. 2d at 185.

¹²350 U.S. 124.

¹³355 U.S. 563.

¹⁴358 U.S. 423.

¹⁵Typical of these cases are *Baugh v. Rogers* (1944) 24 Cal. 2d 200, 142 P. 2d 785; *S.F. Unified School District v. Cal. Building* (1958) 162 Cal. App. 2d 434, 328 P. 2d 785; *Witt v. Jackson* (1961) 17 Cal. Repr. 369; *Lunderberg v. Bierman* (Minn. 1954) 63 N.W. 2d 355; *Moroni v. Instrusion-Prepakt, Inc.* (Ill. 1960) 165 N.E. 2d 346; *Westchester Lighting Company v. Westchester County Small Estates Corp.* (1938) 278 N.Y. 175, 15 N.E. 2d 567.

tioner's contractual obligation, we do not meet the question of a noncontractual right of indemnity or of the relation of the Compensation Act to such a right.¹⁶ There is every indication in the *Ryan* opinion, however, that this Court employed "contract" vocabulary in order to reach an equitable result without expressly overruling *Halcyon Line v. Haenn Ship Coiling and Refitting Corporation* (1952) 342 US 282, in which this Court refused to extend to admiralty the common law rule of contribution between joint tortfeasors.¹⁷ The facts of the instant action present no contractual relationship between the private shipowner and the government. No logical reason either of the policy of the Compensation Act, of the intent of Congress, or of the words of the statute exist, however, for reaching a result in interpreting Section 757(b) in a manner contrary to the decision of the Court in *Ryan* permitting full recovery by the third party from the injured employee's negligent employer. On the contrary, every reason of policy and equity supports permitting petitioner to recover according to the moiety rule. Petitioner has no relation to the employment nexus and has received no benefit under this statute. The liability of the government to Ostrom for compensation under the FECA amounted to \$329.01, whereas a reasonable settlement of the injuries of this man by common law tests was \$16,000. It is inconceivable that Congress intended that the liability of the government to share the

¹⁶350 U.S. 124, 133.

¹⁷In *Halcyon*, however, the Court limited its decision denying contribution to non-collision situations and expressly stated that contribution was a recognized rule in both-to-blame collisions. 342 U.S. 282, 284.

common law damages be altered by indirection in Section 757(b) and thus subject the private shipowner to potentially huge liability without recourse to recover from the equally negligent government vessel.

IV. THE FIRST EXCEPTION TO THE ANCIENT ADMIRALTY RULE OF DIVIDED DAMAGES FOLLOWING A BOTH-TO-BLAME COLLISION SHOULD NOT BE CREATED BY INDIRECTION.

The time-honored rule in admiralty is that the vessels in a both-to-blame collision share their damages equally. *The Schooner CATHERINE* (1854) 17 How. 170; *The NORTH STAR* (1882) 106 US 17, 21. This Court recently stated the accepted rule in *Halcyon Line v. Haccu Ship Ceiling and Refitting Corporation* (1952) 342 US 282, 284:

Where two vessels collide due to the fault of both, it is established admiralty doctrine that the mutual wrongdoers shall share equally the damages sustained by each, as well as personal injury and property damage inflicted on innocent third parties. This maritime rule is of ancient origin and has been applied in many cases, but this Court has never expressly applied it to non-collision cases.

See also Staring, "Contribution and Division of Damages in Admiralty and Maritime Cases," 45 Cal. L. Rev. 304 (1957).

The moiety rule reflects a policy that in maritime collisions the contributory negligence of one of the parties should not bar him from all recovery. The Court of

Appeals for the Ninth Circuit in its opinion below does not take issue with the fact that the divided damages rule would ordinarily result in a division of the settlement award made to Ostrom.¹⁸ But in denying inclusion of this settlement in the damages to be divided between petitioner's vessel and the government vessel, it concluded:

Thus it must be candidly admitted that while the United States once had a duty to other *shipowners* [emphasis by the Court] to navigate carefully in order not to injure its employees, that duty has been abrogated by the [Federal Employees'] Compensation Act.¹⁹

The Court thus concludes that Congress in the FECA intentionally restricted the divided damages rule in admiralty, whereas the legislative history and wording of the statute clearly and completely fail to support this conclusion.

This Court has recognized the peculiar nature of the rule of division of damages after a both-to-blame collision. In *United States v. Shaw* (1940) 309 US 495, 502, the Court stated:

The *THEKLA* turns upon a relationship characteristic of claims for collision in admiralty but entirely absent in claims and cross-claims in settlement of estates. The subject matter of a suit for damages in collision is not the vessel libelled but the collision. Libels and cross-libels for collision are one litigation and give rise to one liability. In equal fault, the entire damage is divided.

¹⁸294 F. 2d at 181.

¹⁹294 F. 2d at 185.

A recent commentator on the moiety rule has described the nature of the liability involved:

Contribution in admiralty is not mere subrogation and, in consequence, the party sued for contribution does not enjoy the advantage of personal defenses he may have had as to the injured party nor even the protection of a statute of limitations which would bar suit if brought by the original libellant [citing cases]. The courts have pointed out that unlike contribution at law, which is an adjustment between tort feors founded upon principles of equity and not of tort liability, contribution in admiralty is a substantive right arising directly from the tort. [citing cases]²⁰

In the opinion below, the Court of Appeals for the Ninth Circuit in creating the first exception to the moiety rule places considerable emphasis on *Smithers and Company, Inc. v. Coles* (D.C. Cir. 1957) 242 F. 2d 220, cert. den. 354 US 914. The Court in that case denied the wife's right to recover for loss of consortium on the grounds that her spouse was given his exclusive remedy for compensation by reason of Section 5 of the Longshoremen's and Harbor Workers' Compensation Act. Petitioner submits that the nature of the liability of a vessel in a mutual fault collision differs fundamentally and historically from a derivative cause of action such as was present in the *Smithers* case. The language of Section 757(b) of the FECA indicates an intention of Congress to provide the sole means of recovery for the employee and his various *beneficiaries*, specifically naming the employee's spouse. For that reason the *Smithers* case in

²⁰Staring, "Contribution and Division of Damages in Admiralty and Maritime Cases", 45 *Cal. L. Rev.* at 334 (1957).

denying an additional recovery to the spouse is not in conflict with the purpose and intent of Section 757(b).²¹ To the extent that the *Smithers* decision, however, purports to deny *all* third party rights of recovery, petitioner respectfully submits that the decision is not in accord with the policy of the compensation act and should be overruled.

So far as petitioner is able to ascertain, denial by this Court of petitioner's right to recover one-half of its settlement to Ostrom would result in creating the first exception to the moiety rule. Petitioner respectfully submits that such exception, because of the tremendous potential liability that it might place on the American merchant fleet, should not come by way of indirection as it would if Section 757 (b) were held to bring this result, but only after careful congressional deliberation.²²

²¹Similarly, *Christie v. Powder Power Tool Corp.* (D.C. 1954) 124 F. Supp. 693, denying alleged tortfeasors the right to file a third party complaint against the United States when an action for wrongful death was commenced by decedent's administrator is not in point.

²²The Brussels Convention of 1924 unifying rules with respect to maritime collisions supports contribution to personal injury damages by both negligent vessels. A total of 34 nations are presently party to the convention, and the United States Senate in S. 2313 is this year considering ratification of it, following recommendation of S. 2313 by the Merchant Marine Subcommittee of the Senate Committee on Interstate and Foreign Commerce. The United States, acting as the world's largest shipowner, strongly supported the contribution rule in hearings on S. 2313, a position in conflict with the stand taken herein. See Report No. 1603, 87th Congress, 2d Session. Report to Accompany S. 2313.

V. DECISIONS OF THIS COURT INTERPRETING THE HARTER ACT SUPPORT INCLUSION OF THE OSTROM SETTLEMENT IN THE DAMAGES TO BE DIVIDED BETWEEN THE GOVERNMENT AND PETITIONER.

The Harter Act, 46 USC 190 *et seq.*, substantially re-enacted in Section 4(2) of the Carriage of Goods by Sea Act, 46 USC 1304 (2)(a), provides categorically that cargo cannot collect directly from the carrying vessel for damages as a result of faults in navigation.²³ In spite of this language, however, this Court has recognized the special nature of an action to divide damages after a both-to-blame maritime collision and has held that the carrying vessel must share, according to the divided damages rule, damages sustained by the non-carrying vessel attributable to its own cargo. *The CHATTANOOCHEE* (1899) 173 US 540, 551-555; *The SUCARSECO* (1934) 294 US 394.

²³The Harter Act provides in pertinent part:

"If the owner of any vessel transporting merchandise or property to or from any port in the United States of America shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped, and supplied, neither the vessel, her owner or owners, agent, or charterers, shall become or be held responsible for damage or loss resulting from faults or errors in navigation or in the management of said vessel nor shall the vessel, her owner or owners, charterers, agent, or master be held liable for losses arising from dangers of the sea or other navigable waters, acts of God, or public enemies, or the inherent defect, quality, or vice of the thing carried, or from insufficiency of package, or seizure under legal process, or for loss resulting from any act or omission of the shipper or owner of the goods, his agent or representative, or from saving or attempting to save life or property at sea, or from any deviation in rendering such service." 46 U.S.C. 192.

The Carriage of Goods by Sea Act, Section 4(2), provides:

"(2) Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from—

"(a) Act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship;" 46 U.S.C. 1304(2)(a).

See also *U. S. v. Atlantic Mutual Ins. Co.* (1952) 343 US 236; *The TOLUMA* (2d Cir. 1934) 72 F. 2d 690, 692.

Petitioner respectfully submits that the principle in issue herein is in accord with the rule that vessels in a both-to-blame collision share cargo damage according to the moiety principle, regardless of the "immunity" for the carrying vessel given by the Harter Act and should be decided accordingly.

CONCLUSION

For the above reasons, it is respectfully submitted that the decision of the Court of Appeals should be reversed and that entered in the District Court should be reinstated with costs to petitioner being granted.

Dated, San Francisco, California,
August 6, 1962.

Respectfully submitted,

CHALMERS G. GRAHAM,

HENRY R. ROLPH,

Proctors for Petitioner.

GRAHAM JAMES & ROLPH,

DAVID C. PHILLIPS,

Of Counsel.

(Appendix A Follows.)

Appendix A

93 CONGRESSIONAL RECORD (pages 13606-13609)
(September 30, 1949)

COMPENSATION FOR EMPLOYEES INJURED IN THE PERFORMANCE OF THEIR DUTIES

Mr. Lucas. Mr. President, I move that the Senate proceed to consider Calendar No. 243, House bill 3191.

The Presiding Officer. The clerk will state the bill by title.

The Chief Clerk. A bill (H. R. 3191) to amend the act approved September 7, 1916 (ch. 458, 39 Stat. 742), entitled "An act to provide compensation for employees of the United States suffering injuries while in the performance of their duties, and for other purposes," as amended, by extending coverage to civilian officers of the United States and by making benefits more realistic in terms of present wage rates, and for other purposes.

The Presiding Officer. The question is on agreeing to the motion of the Senator from Illinois.

The motion was agreed to, and the Senate proceeded to consider the bill (H. R. 3191) to amend the act approved September 7, 1916 (ch. 458, 39 Stat. 742), entitled "An act to provide compensation for employees of the United States suffering injuries while in the performance of their duties, and for other purposes," as amended, by extending coverage to civilian officers of the United States and by making benefits more realistic in terms of present wage rates, and for other purposes, which had been reported from the Committee on Labor and Public Welfare, with amendments.

The Presiding Officer. The clerk will proceed to state the amendments of the committee.

The amendments were, on page 3, line 5, before the word "shall", to strike out "or of any two thereof"; on page 5, line 2, after the word "or", to insert "involves"; in line 8, after "(b)", to insert "and in cases involving disfigurement"; on page 12, line 21, after the word "capacity", to insert a colon and the following proviso: "*Provided*, That for any period of temporary total disability the augmentation of his basic compensation for disability payable under section 3 shall be limited to that part of his monthly pay which is not in excess of \$420"; on page 14, line 12, after the word "for", to strike out "total"; in line 15, after the word "be", to insert "more than \$525 per month and in cases of total disability shall not be"; in line 18, after the word "compensation", to insert "for total disability"; on page 16, line 17, after the numerals "12", to insert "or the sum of \$525"; on page 19, line 5, after "United States", to strike out "but not including Members of Congress"; on page 20, line 25, after the word "occurred", to insert "before May 1, 1943, in the cases of persons employed in the postal service whose compensation was affected by the act of April 9, 1943 (57 Stat. 59), or"; on page 21, line 3, after the numerals "1941", to insert "in all other cases"; in line 6, after the word "in", to strike out "neither" and insert "no"; after line 16, to strike out:

(b) The *remedy* afforded to any person under this act with respect to his own injury or the death of another individual shall be the exclusive remedy against, and be in place of any other legal liability of the United States

or any of its instrumentalities on account of such injury or death; where such liability is determinable by direct judicial proceedings in a civil action or in admiralty, or by proceedings, whether administrative or judicial, under any other workmen's compensation law or under any Federal tort liability statute.

And in lieu thereof to insert the following:

(b) The liability of the United States or any of its instrumentalities under this act or any extension thereof with respect to the injury or death of an employee shall be exclusive, and in place, of all other liability of the United States or such instrumentality to the employee, his legal representative, spouse, dependents, next of kin, and anyone otherwise entitled to recover damages from the United States or such instrumentality, on account of such injury or death, in any direct judicial proceedings in a civil action or in admiralty, or by proceedings, whether administrative or judicial, under any other workmen's compensation law or under any Federal tort liability statute.

On page 22, line 15, after "Sec. 202"; to insert "(a)"; on page 23, after line 13, to insert:

(b) Section 9 of the Federal Employees' Compensation Act, as so amended, is further amended by inserting immediately before the last sentence of subsection (a) of such section the following: "The Administrator may under such limitations or conditions as he shall deem necessary, authorize employing establishments of the United States to provide for the initial furnishing of medical and other benefits under this section, and the Administrator may certify for payment out of the Employees' Compensation Fund vouchers for expenses thus incurred

for such benefits, upon certification by the person required by section 24 to make reports of injury that the expense was incurred, in respect to injury which was accepted by the employing establishment as probably compensable under this act. The form and content of such certification shall be prescribed by the Administrator."

On page 32, after line 20, to insert:

ACCIDENT PREVENTION AND ANNUAL REPORTS

SEC. 209. Section 33 of the Federal Employees' Compensation Act, as amended, is further amended by designating the first two paragraphs thereof, respectively, subsections "(a)" and "(b)" and by adding a new subsection designated as "(c)," as follows:

"(c) In order to reduce the number of accidents and injuries among Government officers and employees, encourage safe practices, eliminate work hazards and health risks, and reduce compensable injuries, the heads of the various departments and agencies are authorized and directed to develop, support, and foster organized safety promotion, and the President may also establish by Executive order a safety council composed of representatives of Government departments and agencies to serve as an advisory body to the Administrator in furtherance of the safety program carried out by the Administrator pursuant to this section, and the President may undertake such other measures as he may deem proper to prevent injuries and accidents to persons covered by this act. Departments and other agencies of the United States shall keep such records of injuries and accidents to persons covered by this act, whether or not resulting in loss of time or the payment or furnishing of benefits, and make such statistical or other

9 reports and upon such forms as the Administrator may by regulation prescribe."

And on page 38, after line 22, to strike out:

ACCIDENT PREVENTION AND ANNUAL REPORTS

SEC. 305. Section 33 of the Federal Employees' Compensation Act, as amended, is further amended by designating the first two paragraphs thereof, respectively, subsections "(a)" and "(b)" and by adding a new subsection designated as "(c)," as follows:

"(c) In order to reduce the number of accidents and injuries among Government officers and employees, encourage safe practices, eliminate work hazards and health risks, and reduce compensable injuries, the heads of the various departments and agencies are authorized and directed to develop, support, and foster organized safety promotion, and the President may also establish by Executive order a safety council composed of representatives of Government departments and agencies to serve as an advisory body to the Administrator in furtherance of the safety program carried out by the Administrator pursuant to this section, and the President may undertake such other measures as he may deem proper to prevent injuries and accidents to persons covered by this act."

The amendments were agreed to.

The Presiding Officer. That completes the committee amendments. The bill is open to further amendment.

Mr. Knowland. Mr. President, I wonder if for the Record the junior Senator from Illinois will not make a brief explanation as to the changes.

Mr. Douglas. Mr. President, this bill is to revise the Compensation Act for disabling accidents suffered by Federal employees. The original act was passed in 1916. The last amendment to the bill was adopted in 1927, or nearly a quarter of a century ago. At that time the maximum monthly benefit which could be paid to any Federal employee was fixed at \$116.66, which amounted to \$1,400 a year. The standard scale of benefits was to be 66 $\frac{2}{3}$ percent of earnings. Therefore, the imposition of the \$1,400 a year maximum meant that all earnings in excess of \$2,100 were not protected.

The 1927 scale was relatively adequate for the 1920's because the average salary of a Government employee was then within the \$2,000-\$2,500 scale. Since then, with the increase in the cost of living and the general upward movement of salaries, Federal salaries have also markedly increased, but the ceiling of compensation rates has not. So that today the maximum amount a person can receive in case of injury is still \$1,400 a year, or \$116.66 a month. That means that in the case of the \$4,000 a year man, the protection is not 66 $\frac{2}{3}$ percent of his earnings, but only 35 percent, and in the case of the \$5,000 a year man the protection is slightly less than 30 percent.

We have raised this ceiling very markedly, to \$525 a month. In this connection we have also added, instead of the straight benefit of 66 $\frac{2}{3}$ percent, an additional benefit of 8 $\frac{1}{3}$ percent if the injured worker has a dependent. Therefore, an injured worker with one dependent will receive 75 percent of his pay as accident compensation if and when injured. But we provide that this 8 $\frac{1}{3}$ percent is taken off in the case of all earnings in excess of \$420 a

month, or approximately \$5,000 a year. By imposing the limit of \$5.25 a month, we have insured that no worker will receive more when injured than his net pay, minus income tax, would be if employed and that there will always be an appreciable difference between the two. This is, of course, done to prevent malingering and to give the injured worker an inducement to recover as quickly as possible from temporary disabilities.

In addition to this, in the case of death we have increased the scales for widows and children, raising them by 10 and 5 percent, respectively, but keeping the maximum of 75 percent.

We have revised the schedule for permanent partial disability, to make it conform to the schedule provided in the Longshoremen's Act.

We have increased burial benefits by from \$200 to \$400.

We have provided additional care where a person is totally disabled and needs an attendant. There are other improvements which are outlined in the committee report.

In all we estimate that the added cost will be approximately \$7,000,000 a year, and to this will be added a total of approximately \$7,000,000 more spread over a 10-year period, if we accept, as the committee proposes, the House amendment. This provides that in case of serious disability, such as the loss of an eye, a foot, an arm, or like injury, if the person has been injured since 1941, the benefits will be raised to the scale outlined in the bill.

I understand that the Senator from Oregon [Mr. Morse] has an amendment on coverage to apply to merchant seamen, and at the appropriate time I can say that the com-

mittee is ready to accept his amendment. But I shall first be glad to try to answer any questions which the Senator from California may have to ask.

Mr. Knowland. I thank the Senator for his very clear explanation.

Mr. Douglas. I thank the Senator very much for his courtesy.

Mr. Wherry. Did the Senator say the bill would be retroactive to 1941?

Mr. Douglas. Only in the case of permanent partial disabilities. Those who have suffered such disabilities since 1941 are to be allowed the new scale in the future.

Mr. Wherry. Does the Senator have any idea of what amount of money that would involve?

Mr. Douglas. Seven million dollars, spread over a 6-year period.

Mr. Wherry. Is that what it would amount to retroactively?

Mr. Douglas. That is correct; a total of \$7,000,000, spread over a 6-year period. That is an item of cost added by the House. The ordinary increase will amount to about \$7,000,000 a year.

Mr. Wherry. I am not asking about that.

Mr. Douglas. The retroactive feature is estimated to cost a total of \$7,000,000, distributed over a period of 6 years, or an average of about \$1,200,000 a year. I should now be glad to have the Senator from Oregon present any amendment which he may have in mind.

Mr. Morse. Mr. President, I wish to say first, that I appreciate the Senator's courtesy in calling my office and notifying me that this bill was before the Senate so that

I might come to the Senate Chamber and present my amendment, I offer the amendment and ask that it may be stated. I understand that the Senator from Illinois is willing to accept the amendment.

The Presiding Officer. The clerk will state the amendment of the Senator from Oregon [Mr. Morse].

The LEGISLATIVE CLERK. On page 22, at the end of line 14, it is proposed to insert a colon and the following: "*Provided, however, That this subsection shall not apply to a master or a member of the crew of any vessel.*"

On page 37, beginning with line 24, strike out all to and including line 6, page 38, and insert in lieu thereof the following:

(g) The amendment made by section 201 of this act to section 7 of the Federal Employees' Compensation Act, making the remedy and liability under such act exclusive except as to masters or members of the crew of any vessel, shall apply to any case of injury or death occurring prior to the date of enactment of this act: *Provided, however, That any person who has commenced a civil action or an action in admiralty with respect to such injury or death prior to such date, shall have the right at his election to continue such action notwithstanding any provision of this act to the contrary, or to discontinue such action within 6 months after such date before final judgment and file claim for compensation under the Federal Employees' Compensation Act, as amended, within the time limited by sections 15 to 20 of such act (including any extension of such time limitations by any provision of this act), or within 1 year after enactment of this act, whichever is*

later. If any such action is not discontinued and is decided adversely to the claimant on the ground that the remedy or liability under the Federal Employees' Compensation Act is exclusive, or on jurisdictional grounds, or for insufficiency of the pleadings, the claimant shall, within the time limited by sections 15 to 20 of such act (including any extension of such time limitations by any provision of this act), or within 1 year after final determination of such cause, whichever is later, be entitled to file a claim under such act.

On page 39, between lines 17 and 18, insert the following new section:

SEAMEN

SEC. 305. (a) Nothing contained in this act shall be construed to affect the exclusion of certain seamen (as defined in the act of March 24, 1943, ch. 26, 57 Stat. 45, as amended; 50 U. S. C., Appendix, sec. 1291) from the terms of the Federal Employees' Compensation Act, as provided by such act of March 24, 1943, as amended.

“(b) Nothing contained in this act shall be construed to affect any maritime rights and remedies of a master or member of the crew of any vessel.

Mr. Morse. Mr. President, I understand the Senator from Illinois is willing to accept the amendment. In effect it continues the seamen in exactly the same legal position which they presently enjoy.

This matter was fought out in 1941, when an attempt was made to bring the seamen under the act, and it was defeated at that time. This amendment continues the historical legal pattern, as far as the seamen are con-

cerned, in respect to workmen's compensation rights. All my amendment does, in effect, is to leave the seamen exactly in the position in which they now are in respect to their legal rights to compensation, giving them, under admiralty law, the right to sue for their compensation.

The Presiding Officer. The question is on agreeing to the amendment offered by the Senator from Oregon.

Mr. Magnuson. Mr. President, I want to associate myself with the amendment offered by the Senator from Oregon. This is a matter which has been before the Merchant Marine and Fisheries Subcommittee. We had previously submitted a similar amendment of the same tenor, and I understand from the Senator from Oregon that his amendment is in similar language. I have had several discussions with the junior Senator from Illinois about the matter, and I think it is a proper amendment. What it does, of course, as the Senator from Oregon has said, is to leave the seamen in their tort right of compensation just as they are now without placing them under the act. I think that is fair and equitable, and the matter should be left in that way. As I said, I want to take this opportunity to thank the Senator from Oregon, and to associate myself with the amendment he has offered.

The Presiding Officer. The question is on agreeing to the amendment offered by the Senator from Oregon [Mr. Morse].

The amendment was agreed to.

Mr. Morse. Mr. President, I ask unanimous consent to have printed at this point in the Record the explanation of my amendment just agreed to, as I intend the purpose

of my amendment to be. The Senator from Illinois [Mr. DOUGLAS] wishes to obtain unanimous consent to have printed without prejudice at this point in the RECORD also, immediately following my explanation, his interpretation of the amendment:

The Presiding Officer. Without objection, the two statements will be printed in the RECORD.

The statements are as follows:

STATEMENT BY SENATOR MORSE

The amendments being offered to H. R. 3191, the bill amending the Federal Employees' Compensation Act, are concerned with two subjects: (1) the status of seamen under the Compensation Act, and (2) the status of pending suits against the Government by Federal employees, brought under the Federal Tort Claims Act and other statutes:

The bill, as passed by the House and reported with amendments, by the Senate Committee on Labor and Public Welfare, provides that as to all Federal employees the Compensation Act benefits shall be exclusive and in place of any other liability of the United States or its instrumentalities. Thus, by section 201 of the bill, a new subsection is added to section 7 of the Compensation Act, reading as follows:

“(b) The liability of the United States or any of its instrumentalities under this act or any extension thereof with respect to the injury or death of an employee shall be exclusive, and in place of all other liability of the United States or such instrumentality to the employee, his legal representative, spouse, dependents, next of kin,

and anyone otherwise entitled to recover damages from the United States or such instrumentality, on account of such injury or death, in any direct judicial proceedings in a civil action or in admiralty, or by proceedings, whether administrative or judicial, under any other workmen's compensation law or under any Federal tort liability statute."

In the report of the Senate committee, this provision is explained as follows:

"Sec. 201. Section 7 of the act would be amended by designating the present language as subsection '(a)' and by adding a new subsection '(b)'. The purpose of the latter is to make it clear that the right to compensation benefits under the act is exclusive and in place of any and all other legal liability of the United States or its instrumentalities of the kind which can be enforced by original proceeding whether administrative or judicial, in a civil action or in admiralty or by any proceeding under any other workmen's compensation law or under any Federal tort liability statute. Thus, an important gap in the present law would be filled and at the same time needless and expensive litigation will be replaced with measured justice. The savings to the United States, both in damages recovered and in the expense of handling the lawsuits, should be very substantial and the employees will benefit accordingly under the Compensation Act as liberalized by this bill.

"Workmen's compensation laws, in general, specify that the remedy therein provided shall be the exclusive remedy. The basic theory supporting all workmen's compensation legislation is that the remedy afforded is a substitute

for the employee's (or dependent's) former remedy at law for damages against the employer. With the creation of corporate instrumentalities of Government and with the enactment of various statutes authorizing suits against the United States for tort, new problems have arisen. Such statutes as the Suits in Admiralty Act, the Public Vessels Act, the Federal Tort Claims Act, and the like, authorize in general terms the bringing of civil actions for damages against the United States. The inadequacy of the benefits under the Employees' Compensation Act has tended to cause Federal employees to seek relief under these general statutes. Similarly corporate instrumentalities created by the Congress among their powers are authorized to sue and be sued, and this, in turn, has resulted in filing of suits by employees against such instrumentalities based upon accidents in employments.

"This situation has been of considerable concern to all Government agencies and especially to the corporate instrumentalities. Since the proposed remedy would afford employees and their dependents a planned and substantial protection, to permit other remedies by civil action or suits would not only be unnecessary, but would in general be uneconomical, from the standpoint of both the beneficiaries involved and the Government."

Under existing law, Government-employed seamen have been accorded the right to assert their maritime rights against the United States under the Suits in Admiralty Act and Public Vessels Act, and, moreover, have been permitted an election to accept the benefits of the compensation in lieu of their maritime rights. The benefits to seamen under maritime law, which would be wiped

out prospectively and to some extent retroactively by section 201 of the bill, are regarded as valuable rights by federally employed seamen, whose numbers exceed 46,000 at the present time. The representatives of maritime unions are now strongly urging, since the bill was placed on the Senate Calendar, that their right to sue the United States under maritime law be preserved and that they be kept in status quo. It would appear that none of the seamen's representatives were apprised of the implications of the bill insofar as it affects their maritime rights. Consequently none of the representatives of maritime labor appeared before the committees which considered the bill, and upon a perusal of the hearings I find no evidence that the effect of the bill upon seamen was explored on the merits. I think this is particularly unfortunate, although undoubtedly inadvertent, in view of the fact that seamen for years have opposed exclusive coverage under workmen's compensation.

Because I think there is merit in their position, and because I feel they should not be deprived of benefits they have enjoyed for many years without opportunity to have their arguments carefully considered by the appropriate committees of the Congress, I am proposing these amendments which are intended, insofar as possible, to preserve the rights of federally employed seamen under existing law to proceed against the United States apart from the Compensation Act. The purpose is likewise to preserve the status quo as to choice of remedies by seamen.

The first amendment, therefore, proposes to add the following proviso to section 7 (b) of the Federal Em-

ployees' Compensation Act, which subsection would be inserted in that act by section 201 of the bill: "*Provided, however, That this subsection shall not apply to a master or a member of the crew of any vessel.*"

By this proviso, it is intended that the special provision, as added to the Compensation Act by this bill, declaring the liability of the United States under that act to be exclusive, shall not apply to seamen employed by the United States. It is not intended that the right of federally employed seamen, as heretofore recognized by the courts, to maintain suits against the United States, shall be lessened by this bill. In short, the amendment is intended merely to preserve the status quo as to seamen. If the Congress should decide to go into this matter further at some future session, it could then do so without delaying the enactment of this urgently needed bill.

I propose further that a new section, section 305, be added to the bill on page 39, between lines 17. and 18, as follows:

"SEAMEN

"Sec. 305. (a) Nothing contained in this act shall be construed to affect the exclusion of certain seamen (as defined in the act of March 24, 1943, chapter 26, 57 Stat. 45, as amended; 50 U. S. C. Appendix, sec. 1291) from the terms of the Federal Employees' Compensation Act, as provided by such act of March 24, 1943, as amended.

"(b) Nothing contained in this act shall be construed to effect any maritime rights and remedies of a master or member of the crew of any vessel."

Subsection (a) of the proposed section 305 is necessary because of the special status of seamen on vessels that were operated under General Agency agreements with the War Shipping Administration, now succeeded by the Maritime Commission. By the so-called Clarification Act of March 24, 1943, as amended (50 U. S. C. Appendix, Sec. 1291), seamen on vessels so operated are excluded from coverage under the Federal Employees' Compensation Act, and it is not intended to supersede the Clarification Act by these amendments. While the House report on the bill (House Rept. No. 729, p. 13) states that it is not intended to repeal this specific statutory exclusion, doubts have been expressed as to whether the bill and the explanation in the House report would have the intended effect. Consequently, to resolve doubts on this score, subsection (a) of section 305 is proposed, in order to maintain the status quo under the Clarification Act.

Subsection (b) of the proposed new section 305 is intended out of caution, to reaffirm what is accomplished by the proposed amendment to section 201 of the bill, lest some other provision of the bill which, in some way not now foreseen, might be construed to take away any election of remedies that seamen might now have. The new subsection would make clear that no provision of this amending act, as distinguished from the existing Compensation Act itself, shall be construed to affect any maritime rights or remedies of seamen. The purpose is to reserve to seamen whatever rights they now have, or may be held to have, under maritime law, and to allay the fears that have been expressed that the amendments to the Compensation Act being made by this bill

will be construed to negate or reduce any of the maritime rights and remedies of seamen.

2. It will be observed that section 303 (g) of the bill, on pages 37 and 38, states that the exclusive remedy under the Compensation Act, as provided in the amendment made by section 201 of the bill, shall not apply to cases of injury or death in which liability under laws other than the Compensation Act was "finally determined" prior to the enactment of the present bill. The effect of this provision is to substitute the remedies provided in the Compensation Act for remedies being pursued by Federal employees in a large number of civil and admiralty actions. Thus rights, if any, presently existing and being asserted in pending court proceedings would be wiped out, automatically. It appears to me that such retroactive effect is not desirable or equitable. Claimants merit better treatment from their Government.

The amendment I propose, as a substitute for section 303 (g) of the bill, reads as follows:

"(g) The amendment made by section 201 of this act to section 7 of the Federal Employees' Compensation Act, making the remedy and liability under such act exclusive except as to masters and members of the crew of any vessels, shall apply to any case of injury or death occurring prior to the date of enactment of this act: *Provided, however,* That any person who has commenced a civil action or an action in admiralty with respect to such injury or death prior to such date, shall have the right at his election to continue such action notwithstanding any provision of this act to the contrary, or to discontinue such action within 6 months after such date before final

judgment and file claim for compensation under the Federal Employees' Compensation Act, as amended, within the time limited by sections 15 to 20 of such act (including any extension of such time limitations by any provision of this act), or within 1 year after enactment of this act, whichever is later. If any such action is not discontinued and is decided adversely to the claimant on the ground that the remedy or liability under the Federal Employees' Compensation Act is exclusive, or on jurisdictional grounds, or for insufficiency of the pleadings, the claimant shall, within the time limited by sections 15 to 20 of such act (including any extension of such time limitations by any provision of this act), or within 1 year after final determination of such cause, whichever is later, be entitled to file a claim under such act."

The effect of this amendment would be to give Federal employees, for a limited period, a right to elect, in certain situations, whether to pursue their remedies (if they have any) sought in pending cases or to come under the terms of the Compensation Act. Thus, the exclusive remedy provision of section 201 would not automatically apply with respect to an injury or death occurring prior to the date of enactment of this bill if a civil action or an action in admiralty had been commenced with respect thereto prior to the date of enactment of this bill. Persons maintaining such actions could discontinue them within 6 months, before final judgment, and be entitled to file a claim for compensation within the time limits provided in the Federal Employees' Compensation Act, as amended, or within 1 year after the enactment of

this bill, whichever is later. Moreover, in recognition of the fact that some legal actions might be decided adversely to the claimant on grounds other than the merits of the claim, it is provided that persons whose pending claims are dismissed on jurisdictional grounds, insufficiency of the pleadings, or because the remedy under the Compensation Act is exclusive, may file claim under the Compensation Act within similar time limitations.

STATEMENT BY SENATOR DOUGLAS

Mr. President, I should like to state my ground for agreeing to the amendments offered by the Senator from Oregon. The primary consideration for accepting the Senator's amendments preserving the maritime rights and other statutory remedies of seamen is the fact that no hearings were held, no arguments were heard, and no discussion was had on this aspect of the pending bill.

Rather than make a summary disposition of these seamen's rights at this time, or to delay for additional hearings the whole measure affecting compensation rights of all Government employees, it seems wiser, as these amendments do, to preserve the status quo as to such rights of seamen. It is my understanding that we do this pending, and without prejudice to, a full consideration by the Congress on the basis of adequate hearings (a) of the alleged merits or demerits of the Compensation Act benefits as compared with traditional and statutory maritime remedies and (b) of the justice or injustice of, or specific circumstances for, permitting these Federal employees to have an election of remedies denied to others.

It is my further understanding that this bill as amended will only change the status quo of seamen to the extent that it increases compensation rights of those Government-employed seamen covered by the act. For the same reason, namely, that we have had no hearings on the matter, we are not seeking to legislate affirmatively as to certain claims and denials of a right of election of remedies under existing laws, which claims and denials have not yet been adjudicated by the Supreme Court, although various other Federal courts have, in effect, held that federally employed seamen have such an election.

In short, until the matter may be more fully considered by Congress, we seek by the amendments merely to make sure that seamen shall lose no existing rights.

The Presiding Officer. The bill is open to further amendment. If there be no further amendment, the question is on the engrossment of the amendment and the third reading of the bill.

The amendment was ordered to be engrossed and the bill to be read a third time.

The bill H. R. 3191 was read the third time and passed.

Mr. Douglas. Mr. President, I move that the Senate insist upon its amendment, request a conference with the House of Representatives thereon, and that the Chair appoint the conferees on the part of the Senate.

The motion was agreed to; and the Presiding Officer appointed Mr. DOUGLAS, Mr. NEELY, Mr. WITHERS, Mr. TAFT, and Mr. DONNELL conferees on the part of the Senate.

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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 65

WEYERHAEUSER STEAMSHIP COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the district court (R. 55) and its supplemental opinion (R. 64) are reported, respectively, at 174 F. Supp. 663 and 178 F. Supp. 496. The opinion of the Court of Appeals for the Ninth Circuit (R. 148) is reported at 294 F. 2d 179.

JURISDICTION

The judgment of the court of appeals (R. 160) was entered on August 30, 1961. A timely petition for rehearing was denied on October 24, 1961 (R. 161). The petition for a writ of certiorari was filed on January 19, 1962, and was granted on March 5, 1962 (R. 161). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

Whether Section 7(b) of the Federal Employees' Compensation Act, which states that the liability of the United States under the Act for injuries to its employees "shall be exclusive, and in place, of all other liability of the United States * * * to the employee * * * and anyone otherwise entitled to recover damages from the United States * * * on account of such injury," precludes a suit by a third party to obtain contribution to the payment of damages on account of an injury to a federal employee covered by the Act.

STATUTES INVOLVED

The Federal Employees' Compensation Act (Act of September 7, 1916, 39 Stat. 742, as amended, 5 U.S.C. 751, *et seq.*) provides in pertinent part:

Section 1(a) [5 U.S.C. 751(a)]—The United States shall pay compensation as hereinafter specified for the disability or death of an employee resulting from personal injury sustained while in the performance of his duty, but no compensation shall be paid if the injury or death is caused by the willful misconduct of the employee or by the employee's intention to bring about the injury or death of himself or of another; or if intoxication of the injured employee is the proximate cause of the injury or death.

* * * * *

Section 7(b) [added by Section 201 of the Act of October 14, 1949, 63 Stat. 861, 5 U.S.C. 757(b)]—The liability of the United States or any of its instrumentalities under this Act

or any extension thereof with respect to the injury or death of an employee shall be exclusive, and in place, of all other liability of the United States or such instrumentality to the employee, his legal representative, spouse, dependents, next of kin, and anyone otherwise entitled to recover damages from the United States or such instrumentality, on account of such injury or death, in any direct judicial proceedings in a civil action or in admiralty, or by proceedings, whether administrative or judicial, under any other workmen's compensation law or under any Federal tort liability statute * * *.

STATEMENT

In September 1955 the S.S. F.E. WEYERHAEUSER and the Army dredge PACIFIC collided off the Oregon Coast (R. 55). This action, which arises from the collision, was brought by the petitioner, against the United States under the Public Vessels Act, 43 Stat. 1112, 46 U.S.C. 781, *et seq.*, in the United States District Court for the Northern District of California. On cross-motions, the district court found that the collision occurred through the mutual fault of the two vessels (R. 63). The court accordingly held that each party was entitled to recover of the other one-half of its provable damages and court costs sustained as a result of the collision (*ibid.*). The parties thereafter entered into a stipulation concerning the damages each suffered. The only disputed item of damages involved the liability of the United States for one-half of the amount of a settlement entered into by petitioner and one Reynold E. Ostrom, a civil service employee of the United States

who had been serving aboard the PACIFIC, for personal injuries suffered in the collision.

Ostrom had received compensation under the Federal Employees' Compensation Act¹ (R. 72), and thereafter brought suit against petitioner to recover damages for his injuries (R. 73). After an unsuccessful attempt to implead the United States in that action (R. 41-46, 49-52), petitioner settled Ostrom's claim for \$16,000, an amount stipulated to be reasonable (R. 68), and sought to include that amount in the apportionment of damages. The only issue before the district court on the question of damages was whether the United States must contribute to petitioner's settlement with Ostrom (R. 69). The district court found that the United States had \$37,439.26 provable damages and petitioner had damages of \$43,652.13 (including the \$16,000 paid to the government employee) (R. 71-75). The United States was ordered to contribute one-half the difference between the parties' provable damages, or a total of \$3,106.44 (R. 74). The court thus held that the \$16,000 paid to Ostrom in settlement of his claim against petitioner was an item of provable damage to which the United States must contribute in the overall apportionment of damages. A final decree was entered on June 20, 1960 (R. 76-78).

On the appeal of the United States to the Court of Appeals for the Ninth Circuit, that court reversed

¹ Ostrom reimbursed the United States for its compensation outlay after his settlement with petitioner (R. 73), as required by Section 26 of the Federal Employees Compensation Act, 5 U.S.C. 776, discussed *infra*, pp. 15-16, 18, 22-23, 29, 33.

and remanded with directions to recompute the damages after excluding the Ostrom settlement, holding that the exclusive-liability provision of the Federal Employees' Compensation Act precluded contribution by the United States on account of an injury to one of its employees.

SUMMARY OF ARGUMENT

I

Section 7(b) of the Federal Employees' Compensation Act provides that the liability of the United States to make compensation payments under the Act "with respect to the injury or death of an employee shall be exclusive, and in place, of all other liability of the United States * * * to the employee * * * and anyone otherwise entitled to recover damages from the United States * * * on account of such injury * * * under any Federal tort liability statute * * *." Petitioner brought this suit under the Public Vessels Act, 46 U.S.C. 781, *et seq.*, a Federal tort liability statute, seeking to impose upon the United States a tort liability "with respect to the injury or death of an employee" of the United States and attempting "to recover damages from the United States * * * on account of such injury * * *". Petitioner's claim is therefore foreclosed by the plain words of the statute.

II

Congress had two primary purposes when it passed the Federal Employees' Compensation Act in 1916: (1) to grant to federal employees a swift, economical, and sure right of compensation, regardless of

considerations of fault, for employment-connected injuries; and (2) as a *quid pro quo* for the United States as employer, to limit the types and amounts of recoverable damages for such injuries. These considerations are so central to the scheme of the Act that one cannot attach to the injured employee's retained right to sue third parties consequences which would abridge the statutory limitation upon the liability of the United States. This conclusion is confirmed by the reimbursement and subrogation provisions of the Act, which provide that the injured employee may not even retain the proceeds of a suit against a third party until he has reimbursed the United States for its compensation payments. *A fortiori*, the employee may not increase his recovery over the statutory amounts if the result is to impose upon the United States a liability in excess of its liability for compensation payments under the Act.

III

In situations where both the United States and a third party have negligently caused the injury of a federal employee, there are three possible ways in which one might define the rights and liabilities arising out of suits against third parties without impairing the statutory limitation upon the liability of the United States.

The first alternative—restriction of the employee's right to sue third parties—would be inconsistent with this Court's decisions holding that an injured party may recover his entire damages from either of two vessels, both of which were at fault.

The second alternative—to allow contribution on behalf of the third party but not in excess of the amount which the United States could be required to pay to its employee under the Compensation Act—is a compromise without support in the language of Section 7(b) and runs counter to the provisions of the statute which allow the United States to recoup its compensation payments out of the proceeds of a suit against third parties. *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406, 412.

Only the third alternative—denying the right of contribution from the United States to a third party at fault with respect to the injury of a federal employee covered by the Act—is at once consistent with the fundamental purposes of the Federal Employees' Compensation Act, with this Court's prior decisions, and with the language of the Act, including its reimbursement provisions. This third alternative should, therefore, be applied to a case such as this one in accordance with the plain mandate of the statutory language.

IV

The courts of appeals which have considered the language and purposes of the "exclusive liability" provision of the Federal Employees' Compensation Act or of the almost identical provision of the Longshoremen's and Harbor Workers' Act have unanimously sustained the immunity of the United States from efforts by third parties to obtain contribution.

The cases relied upon by petitioner (as it concedes) involve contractual claims to indemnity and not rights to contribution or indemnity in tort. Since it is also

conceded that there is no basis for a contractual claim in the instant situation, these cases are not in point. Also unavailing are the cases which sustain the liability of a cargo-carrying vessel for contribution to cargo damage, notwithstanding such a vessel's immunity from suit for negligence by its cargo under the Harter Act (46 U.S.C. 190, *et seq.*). The discrete language and purposes of the Harter Act are far removed from the scheme of the Federal Employees' Compensation Act.

ARGUMENT

I

THE EXPRESS TERMS OF SECTION 7(b) OF THE FEDERAL EMPLOYEES' COMPENSATION ACT PRECLUDE PETITIONER'S ATTEMPT TO OBTAIN CONTRIBUTION OR TORT RECOVERY FROM THE UNITED STATES

On its face, the language of Section 7(b) of the Federal Employees' Compensation Act (added by Section 201 of the Act of October 13, 1949, 63 Stat. 861, 5 U.S.C. 757(b)), limits the liability of the United States with respect to the injury or death of one of its employees to the compensation payable under the Federal Employees' Compensation Act. It explicitly provides:

The liability of the United States * * * under this Act * * * with respect to the injury or death of an employee shall be exclusive, and in place, of all other liability of the United States * * * to the employee * * * and anyone otherwise entitled to recover damages from the United States * * * on account of such injury or death in any direct judicial proceedings in a civil action or in admiralty, or by proceedings

whether administrative or judicial, under any other workmen's compensation law or under any Federal tort liability statute * * *.

It is difficult to see how Congress could have stated more clearly that the only liability for the injury or death of an employee to which the United States shall be subjected is its liability to furnish compensation under the Act, regardless of by whom or under what tort or workmen's compensation statute any other action is brought. The United States, the Act declares, cannot be held liable under any other statute either to the employee or to "anyone otherwise entitled to recover damages * * * on account of" the injury or death of the employee. Petitioner brought this action under the Public Vessels Act, 46 U.S.C. 781, *et seq.*, a "Federal tort liability statute", seeking to impose upon the United States a liability "with respect to the injury or death of an employee" of the United States and "to recover damages from the United States * * * on account of such injury * * *". By the statutory terms, therefore, it is foreclosed.

That the all-inclusive language of Section 7(b) was carefully chosen by Congress is confirmed by an examination of the successive bills which resulted in the addition to the statute (in 1949) of the "exclusive liability" provisions of the Act. The bill which was first drafted and passed by the House of Representatives spoke in terms of a limitation upon the remedies of one complaining of his own injury or of the death of another (95 Cong. Rec. 8759):

(b) The remedy afforded to any person under this action with respect to his own injury

or the death of another individual shall * * * be the exclusive remedy against, and be in place of any other legal liability of, the United States * * * on account of such injury or death * * *.

This language was perhaps susceptible of a limiting interpretation, such as petitioner suggests in its brief (pp. 7-8), in terms of particular types of claims (*e.g.*, claims by or in the place of the injured party). However, the reference to remedies was excised by the Senate Committee on Labor and Public Welfare, which shifted the emphasis of the bill from the rights of claimants to the immunity of the federal government. It was the Senate version, specifying that the statutory liability of the United States is "exclusive, and in place, of all other liability * * *", which was finally enacted as law. In these circumstances, there is certainly no escape from the conclusion that the words of the statute are to be given their normal scope and application. See, *Underwood v. United States*, 207 F. 2d 862, 864 (C.A. 10), "It is significant * * * that the Congress chose to speak in terms of liability of the government, not in terms of remedies or rights of action, and in doing so, it gave a right of action only to the extent that it saw fit to relax governmental immunity from any liability."

Although, as we shall show *infra*, pp. 25-28, this has been the conclusion of all the courts which have considered and discussed the question, petitioner contends that, however clear and plain the words of the statute may be, they do not express the underlying intent of Congress. In its view, Section 7(b) of the Federal Employees' Compensation Act should not

be read to affect the rights of third parties to contribution under admiralty law but should be confined to situations involving the relations of the United States to its employees and their beneficiaries. Although we do not believe that there is any need to go behind the plain language of the statute, we submit that petitioner's contentions are also without support in the relevant history.

II

NEITHER THE RIGHT TO SUE THIRD PARTIES NOR THE CONSEQUENCES OF SUCH SUITS CAN INFRINGE THE STATUTORY LIMITATION UPON THE LIABILITY OF THE UNITED STATES

Crucial to a correct resolution of the present case in terms of the purposes of the federal compensation act is an understanding of the relationship of its employer-employee provisions to those provisions which deal with the employee's right to sue third parties. We shall show in this section that, under the compensation scheme established by the federal statute, the reciprocal rights and liabilities of the United States and its employees are not to be infringed as a result of the employee's retention of a right to sue third parties.

The history and wording of the statute show: (1) that the relationship of the United States to its employees involves a bargained-for compromise of the rights and liabilities of each; and (2) that the provisions allowing and regulating suits against third parties are merely incidental to the statutory compensation scheme and were never intended to permit inter-

ference with the hard-fought compromise at the heart of the statute.

We reserve for the next section of our argument consideration of the exact nature of the consequences of a federal employee's suit against a third party when the federal government and the third party have both been at fault with respect to the injury. At this point, we emphasize only that the rights and liabilities arising out of such third-party practice must necessarily be shaped to avoid a conflict with the fundamental purposes of the Federal Employees' Compensation Act.

A. THE LEGISLATIVE HISTORY

1. *The two primary purposes of the Federal Employees' Compensation Act*

In 1916, Congress passed the Federal Employees' Compensation Act which, as amended, is now found at 5 U.S.C. 751, *et seq.* The main objectives were two-fold. The first and most important was to grant to federal employees a swift, economical and assured right of compensation for injuries arising out of the employment relationship, regardless of the negligence of the employee or his fellow servants or the lack of fault on the part of the United States. The legislative history testifies overwhelmingly to the existence and force of this purpose, and its importance has never been in dispute.

Congress' second purpose, like the first, followed the lead of a number of earlier State compensation statutes. The employer was not to be left without a *quid pro quo* for his surrender of the galaxy of

defenses to tort liability with which he had been surrounded at common law. As stated by Mr. Justice Brandeis in *Bradford Electric Co. v. Clapper*, 286 U.S. 145, 159, the purpose of workmen's compensation laws is to provide "not only for employees a remedy which is both expeditious and independent of proof of fault, but also for employers a liability which is limited and determinate." In exchange for its assumption of a liability regardless of its own or the employee's fault, the United States reserved a limitation as to the types and amounts of damages recoverable in cases of employment-connected injuries.

This reservation was indeed of some importance in convincing reluctant Congressmen to agree to a waiver of the defense of employee fault. As the legislative history shows, the government's limitation of liability was in fact, as well as in theory, the consideration which the proponents of the compensation measure offered its opponents in exchange for the absolute liability of the United States. Senator Smith of Georgia introduced an amendment which would have reduced the compensation which a federal employee would be entitled to recover in situations "where the negligence of the employee contributes in whole or in part to the cause of the injury * * *". 53 Cong. Rec. 12888. Arguing against such an amendment, Senator Hughes referred to the "infinitely" greater sums an employee would receive from a jury and explained: "This is * * * a compensation proposition in which the employee waives a great deal of what he might expect to receive, and in which the Government waives a great deal that it

might demand even if it were a private employer, and they compromise their differences * * *". 53 Cong. Rec. at 12889. Senator Cummins opposed any consideration of the employee's fault for an identical reason (53 Cong. Rec. 12894):

* * * If the Government of the United States was suable, and I will assume for the moment that it is, because in fairness it ought to be, we are substituting for the liability of an employer to an employee a compensation which is so much less than the rule of liability would afford or give the employee that in justice we must give the employee some advantage that he would not have under the rigorous rule of the common law.

This second purpose was no less prominent, thirty-three years later, when the statute was amended to liberalize the benefit provisions and to add the exclusive-liability features of section 7(b). The Senate Report explained (S. Rep. 836, 81st Cong., 1st Sess., p. 23):

Section 201: Section 7 of the act would be amended by designating the present language as subsection "(a)" and by adding a new subsection "(b)." The purpose of the latter is to make it clear that the right to compensation benefits under the act is exclusive and in place of any and all other legal liability of the United States or its instrumentalities of the kind which can be enforced by original proceeding whether administrative or judicial, in a civil action or in admiralty or by any proceeding under any other workmen's compensation law or under any Federal tort liability statute. Thus, an important gap in the present law would be filled and at the same time needless and expensive

litigation will be replaced with measured justice. The savings to the United States, both in damages recovered and in the expense of handling the lawsuits, should be very substantial and the employees will benefit accordingly under the Compensation Act as liberalized by this bill.

2. Actions against third parties

Having provided for the prompt and certain compensation of injured employees and for the limited liability of the United States, the Sixty-fourth Congress had all but covered the fields of its interest in the Federal Employees' Compensation Act. Of far less importance and only briefly discussed were two remaining questions: (1) Whether the right to sue negligent third parties remained; and (2) whether the United States or the federal employee was to enjoy the proceeds of such suits. The first question appears to have been answered without any difficulty. There was no reason why a third party who would otherwise be liable to a federal employee should be relieved of liability by a compensation scheme to which he had contributed nothing.

The second question—how the proceeds of such suits would be distributed—required at least somewhat more attention. There were objections to the proposed provisions (now found in 5 U.S.C. 776-777) which required an employee to reimburse the United States, out of any tort recovery against third parties, for compensation payments made or to be made. During the hearings on an early draft of the bill (H.R. 15222), one Congressman urged that the employee be left "untrammelled", saying further (Hearings before

the House Committee on the Judiciary, 63d Cong., 2d Sess., on Federal Employees' Compensation, Serial 16, Part 2, p. 63):

Let the Government compensate him, and if he has any remedy against anybody else let him pursue it to the limit.

A draftsman of the bill responded (*ibid.*):

We felt, as in a great many other cases, that the compensation granted here was going to cost the Government a lot of money. The man is receiving far in excess of anything that he now can get. He is receiving compensation where the United States has been guilty of no fault at all. He is receiving compensation even where he himself may have been guilty of contributory negligence; and therefore in a case like this it would seem only fair to limit him, so far as the Government is concerned, to the amount of compensation granted by the act, and if he can get a large verdict from a railroad or some other corporation he can pocket the difference. * * *

As passed, the Act corresponded to the proposed bill and provided that the United States should recover any compensation payments made or payable before the employee could enjoy the benefits of a tort action against a negligent third party.² To assure the federal government the enjoyment of this right, the United States was authorized to require the federal employee, as a condition of receiving compensation payments, to assign it any available claim against a third party.³

² 5 U.S.C. 777, reprinted in the Appendix, p. 38.

³ 5 U.S.C. 776, reprinted in the Appendix, p. 37.

B. THE RELATIONSHIP OF THE PRIMARY PURPOSES OF THE ACT TO
THE RIGHT TO SUE THIRD PARTIES

There can be no question as to the relative importance of the two primary purposes of the Act and of the provisions involving the right to sue negligent third parties. Congress' concern was largely exhausted when it had defined the rights and liabilities between the United States and its injured employees. Workmen's compensation, the Congressmen repeatedly emphasized, is to be viewed as a cost of doing business to be borne by the business. It has nothing to do with the fault or negligence of the employer or employee, let alone with the fault of third parties. The right to sue third parties was retained not as an integral and significant part of the statutory scheme but simply because there was no reason to allow a third party to benefit from the Compensation Act, to which he was a stranger, at the expense of either the United States or its employee.

These facts alone tend strongly to indicate that the consequences of a federal employee's right to sue a third party cannot be allowed to interfere with the primary purposes of the compensation statute. If in particular circumstances exercise of the employee's right to sue were shown to involve an infringement of the provisions of the Act limiting the liability of the United States, we believe that the right to sue and not the limitation of liability would have to give way. The central and overriding purpose of compensating injured employees was accomplished by granting the statutory compensation. That the desirability of giv-

ing employees benefits beyond those granted by the federal statute was thought less important than the limitation on the liability of the United States is evident, without more, from the fact that Congress denied injured employees the option of suing the United States in tort. See *Dahn v. Davis*, 258 U.S. 421. The employee's right to sue third parties to recover amounts in excess of statutory compensation stands on no higher footing if it comes into conflict with the statutory limitation upon the liability of the United States.

Actually, there need be no speculation as to what Congress would have done had it been faced with a conflict between allowing an employee to sue third parties for amounts in excess of his statutory compensation and the purpose of limiting the liability of the United States. Congress in fact considered and resolved an almost identical question. In the reimbursement provisions of the original Act and of all succeeding Acts, Congress has provided that an employee shall not enjoy the benefits of any tort recovery until the United States has recovered the amount of its statutory liability. It follows, *a fortiori*, that no employee would be allowed to increase his recovery by a tort action if the result would be to impose upon the United States a liability *in excess of* that imposed by the statute.

In contending that the right of a federal employee to sue a third party is necessarily subordinate to the statutory limitation of the liability of the United States, we do not suggest that the consequence need be the curtailment of the employee's rights against

third parties. The respective rights of the United States, its employee, and a negligent third party arising out of a suit against a third party is a subject reserved for the next section of our argument. We have merely sought to establish that, however these third-party relationships are defined, it must be in a way which will not permit the incidental right of an employee to sue third parties to dominate the hard-fought compromise at the heart of the compensation statute. Whether some part of the employee's right to sue a third party or some part of the third party's right to contribution must give way, the United States should not be deprived of its retained consideration for assuming absolute liability to its employees. In sum, the United States cannot be subjected to a greater liability when it and another party are both negligent than when it alone is negligent.

III

A NEGLIGENT THIRD PARTY HAS NO RIGHT OF CONTRIBUTION AGAINST THE UNITED STATES FOR THE PAYMENT OF DAMAGES ARISING FROM AN INJURY COMPENSABLE UNDER THE FEDERAL EMPLOYEES' COMPENSATION ACT

We have shown in the last section that the statutory limitation of the liability of the United States cannot be infringed as a direct or indirect consequence of the liability of a negligent third party to a federal employee. This conclusion does not, however, fully dispose of the present case.

In situations such as this where both the United States and a third party have been negligent to a federal employee and where there is concededly a

case-law rule of contribution, there are three possible reconciliations of the relationships of the three parties which would not infringe the fundamental purposes of the federal compensation statute. (1) the federal employee's right of action against the negligent third party could be denied or limited. (2) The United States could be required to make contribution but not in excess of its statutory liability. (3) The negligent third party could be required to bear the entire burden of the damages resulting from the injury.

1. The first of these alternatives has not been adopted by any court and can be quickly disposed of. The choice has always been clear between the equitable claim of a negligent third party that it should not be made to pay more than half the damages jointly caused by it and another tortfeasor and the claim of an innocent injured party that he should receive full compensation. In *The Atlas*, 93 U.S. 302, and the *The Juniata*, 93 U.S. 337, the Court held that an innocent victim could recover full damages from either of the two vessels through whose mutual fault the injury had been caused. The risks and burdens of obtaining contribution were placed upon the wrongdoer who was sued. The Court has never departed from this principle.

2. The second alternative is to hold the United States liable for contribution, but only in an amount not in excess of its statutory liability. The Third Circuit at one time adopted this alternative in construing provisions of the Longshoremen's and Harbor Workers' Compensation Act which are almost

identical to those in the Federal Employees' Compensation Act.⁴ *Baccile v. Halcyon Lines*, 187 F. 2d 403, reversed on another ground, 342 U.S. 282. If the considerations which favored adoption of an alternative that at once maintained the statutory limitation of the employer's liability and allowed some sharing of a jointly-caused liability seem apparent,⁵ the two reasons which caused its later repudiation by the Third Circuit (see *infra*, pp. 27-30) are nonetheless compelling.

First, and of crucial importance, there is no statutory authority for such a compromise measure under either the Federal Employees' Compensation Act or the Longshoremen's and Harbor Workers' Act. Each provides unequivocally that the liability of the em-

⁴ 33 U.S.C. 905 provides:

"§ 905. *Exclusiveness of liability.*

"The liability of an employer prescribed in section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and any one otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death * * *."

See also 33 U.S.C. 933 dealing with the employee's right of action against third persons.

⁵ It is worth noting that the division of liability under the Third Circuit's *Halcyon* scheme is by no means perfect. Since the government's obligation continues as long as the disability persists, it can and does happen that the federal government's obligation to make periodic payments under the compensation statute ultimately exceeds the damage liability imposed on the third party wrongdoer. In this event the United States, which is alone liable for all sums in excess of the damages recovered by the employee, would bear more than one-half the cost of the injury to the employee.

ployer under specified sections of each statute which set out the compensation scheme shall be exclusive and in place of all other liability. A liability for contribution to the payment of damages is *not* a liability arising under the compensation statute and does not become one simply because the amount of damages recoverable by a third party is limited to the amount of compensation that an employee covered by the statute could recover. Therefore a liability for contribution, even so limited, is forbidden by the "exclusive liability" provisions to precisely the same extent as is any other liability against the employer which is not based upon the Act.

Second, as this Court plainly held in *Pope & Talbot, Inc. v. Hawk*, 346 U.S. 406, 412, any denial to an employer of the right to reimbursement of the amount of his compensation liability out of the recovery from a negligent third party is in conflict with the reimbursement and subrogation provisions of a statute such as the Longshoremen's Act (in *Pope & Talbot*) or the Federal Employees' Compensation Act (in this case), both of which permit this recoupment of compensation payments without regard to the employer's fault. See Appendix, pp. 37-38; see, also, *Ryan Stevedoring Co. v. Pan-Atlantic Corp.*, 350 U.S. 124, 146 (dissenting opinion of Justice Black). In *Pope & Talbot* a third-party had impleaded the negligent employer, Haenn, and contended that the employee's judgment against it should be reduced by the amount of compensation which the employer had paid to the injured employee. It was argued that if the employee kept such money, he would have a prohibited double recovery; and that if the

money were reimbursed to the employer it would reward an employer whose negligence contributed to the injury. This Court disposed of the contention, saying (346 U.S. at 412):

A weakness in this ingenious argument is that § 33 of the Act has specific provisions to permit an employer to recoup his compensation payments out of any recovery from a third person negligently causing such injuries. Pope & Talbot's contention if accepted would frustrate this purpose to protect employers who are subjected to absolute liability by the Act. * * *

For these reasons, we submit, the alternative adopted by the Third Circuit in *Bacile v. Halcyon Lines*, 187 F. 2d 403, is unacceptable.*

3. Only the third alternative mentioned above—that the negligent third party be required to bear the entire burden of the damages resulting from the injury to a federal employee—is consistent with the fundamental purposes of the Federal Employees' Com-

* It is also worth noting that a simple damage remedy could not, in general, be used to require contribution from the United States in an amount not in excess of its statutory liability under the Federal Employees' Compensation Act. The United States is obligated under the Act to make compensation payments over a period of time in amounts which vary with various contingencies relative to the health and employment of the injured employee. To accomplish the result contemplated by the Third Circuit a court would have to order the United States to make these payments, if and when they would have become due to a federal employee, but to make the payments to the third party rather than to the federal employee. It is by no means clear that a court of admiralty should enter such a decree. See *The Eclipse*, 135 U.S. 599, 608; *Sound Marine & Machine Corp. v. Westchester County*, 100 F. 2d 360 (C.A. 2), certiorari denied, 306 U.S. 642; Gilmore and Black, *The Law of Admiralty*, § 1-14.

pensation Act, this Court's prior decisions, and the language of the statute, including its subrogation provisions.

If it be said that this alternative defeats the general rule of divided damages in admiralty in one narrowly limited group of cases, the answer is that this is no more than the general consequence of any statutory amendment to a body of case law. Moreover, no unusual liability is imposed upon one in the position of the petitioner in a case such as this. As we have noted above, it has long been settled that either one of two vessels both of which were at fault can be sued by an innocent victim for the entire amount of his damages. *The Atlas*, 93 U.S. 302; *The Juniata*, 93 U.S. 337. The party that is sued is always remitted for his right of contribution to the risks and burdens of a separate action against the other vessel. The Federal Employees' Compensation Act simply cuts off the essentially equitable right of one of two parties at fault to share the consequences of their fault. It returns the petitioner to the situation at common law, overruling in only one restricted situation the rule of contribution which the Court held in *The Catharine*, 17 How. 169, 177, to be in general "the most just and equitable".

⁷ Indeed there is room to question whether, even without the "exclusive liability" provisions of the federal compensation statute, the rule of divided damages would be appropriate in a situation where one party remains liable for the payment of amounts in respect of the injury above and beyond the damages sought to be divided. Here, the United States is not released from its liability to its employee by the petitioner's payment of damages. If the statutory compensation scheme results in the employee's having a right to payments beyond

IV

THE RELEVANT DECISIONS UNDER THE FEDERAL EMPLOYEES' COMPENSATION ACT AND THE LONGSHOREMEN'S AND HARBOR WORKERS' ACT SUPPORT THE IMMUNITY OF THE UNITED STATES FROM LIABILITY TO THIRD PARTIES ON ACCOUNT OF ITS NEGLIGENCE IN INJURING A FEDERAL EMPLOYEE

Five courts of appeals have construed the "exclusive liability" provision of the Federal Employees' Compensation Act (5 U.S.C. 757(b)) or the almost identically worded provision of the Longshoremen's and Harbor Workers' Act (33 U.S.C. 905) as applied to a suit by a third party who does not claim to stand in the position of the injured employee.* Each of these circuits holds that the third party's suit is barred by the plain meaning and clear purposes of these statutes. We know of no appellate decision to the contrary, and petitioner has referred this Court to none.

A. CASES UNDER SECTION 7(b) OF THE FEDERAL EMPLOYEES' COMPENSATION ACT

The decisions of the lower federal courts construing Section 7(b) as applied to noncontractual suits by third persons arising from injuries to federal em-

the amount received from the third party, the United States alone must bear this expense. There is little equity in requiring the United States to pay half the sums which are necessary to release the petitioner from liability and yet remain liable itself; and, absent such equity, there is no basis for contribution.

* See, *Smither and Co., Inc. v. Coles*, 242 F. 2d 220 (C.A. D.C.); *Lo Bue v. United States*, 188 F. 2d 800 (C.A. 2); *Drake v. Treadwell Construction Co.*, 299 F. 2d 789 (C.A. 3); *United States v. Weyerhaeuser Steamship Co.*, 294 F. 2d 179 (C.A. 9); *Underwood v. United States*, 207 F. 2d 862 (C.A. 10).

ployees have all upheld the immunity of the United States.

At times the courts have simply relied on the plain words of the statute. In *Christie v. Powder Power Tool Corp.*, 124 F. Supp. 693 (D. D.C.), the administrator of a deceased federal employee sued a third-party tortfeasor, who sought to implead the United States on the ground that it had breached "an independent right owed to the third-party plaintiffs by the United States" and was, therefore, liable for "contribution and indemnity" under the Federal Tort Claims Act. The court first carefully noted (124 F. Supp. at 694):

The fact that they are not seeking indemnity under contract is * * * made abundantly clear by the language in their brief in which they state that the indemnity sought "is not contractual indemnity but is indemnity for tort—for a breach of an independent right owed to the third-party plaintiffs by the United States."

In dismissing the third-party complaint on the motion of the United States, the court then stated (124 F. Supp. at 694-695; emphasis in original):

It appears from the exhibits attached to the motion that plaintiff in this case has received the benefits provided by the Federal Employees Compensation Act, 5 U.S.C.A. § 751 et seq. Any other recovery against the United States is precluded by the terms of that Act, reading, so far as material, as follows: "The liability of the United States * * * with respect to the * * * death of an employee shall be exclusive,

and in place of all other liability of the United States * * * to the employee, his legal representative * * * and anyone otherwise entitled to recover damages from the United States * * * on account of such * * * death, in any * * * proceedings, whether administrative or judicial * * * *under any Federal tort liability statute.*" 5 U.S.C.A. § 757(b).

More recently, in *Drake v. Treadwell Construction Co.*, 299 F. 2d 789, 790, pending on petition for a writ of certiorari, No. 65, Oct. Term, 1962, the Third Circuit has held that Section 7(b) of the Act "withdraws whatever consent the Tort Claims Act, considered alone, would give to the imposition of tort liability upon the United States * * * whether the claim is asserted in the interest of the employee or anyone else." Drake, a government employee receiving compensation under the Act, sued Treadwell for its negligence in the manufacture of an expansion tank which exploded and injured him. Treadwell impleaded the United States under the Federal Tort Claims Act for contribution,⁹ and also claimed indemnity on the basis of "an implied contract that the Government will indemnify Treadwell" (299 F. 2d at p. 791). The district court held against the United States. The court of appeals, relying explicitly on the language of Section 7(b) of the Compensation Act,⁹ reversed the district court's judgment

⁹ The United States conceded that, absent the exclusivity provision of Section 7(b) of the Compensation Act, the United States could be held liable for contribution to Treadwell under *United States v. Yellow Cab Co.*, 340 U.S. 543.

against the United States on the ground that (299 F. 2d at p. 791):

Contribution required of a joint tort-feasor toward the satisfaction of a covered government employee's judgment in tort seems as clearly within the language of Section 7(b) as is total direct liability to the injured employee. * * * ¹⁰

A similar reliance on the language of the statute caused the Tenth Circuit to hold that Section 7(b) precludes an action by a spouse for a loss of consortium. *Underwood v. United States*, 207 F. 2d 862; see *supra*, p. 10.

The Ninth Circuit has reached the same result, emphasizing not only the language of the statute but also the fundamental concept of:

* * * a balancing of the sacrifices and gains of both employees and employers, in which the former relinquished whatever rights they had at common law in exchange for a sure recovery under the compensation statutes, while the employers on their part, in accepting a definite and exclusive liability, assumed an added cost of operation which in time could be actuarially measured and accurately predicated; incident to this both parties realized a saving in the form of reduced hazards and costs of litigation. * * * [*Posegate v. United States*, 288 F. 2d 11, 13 (quoting from *Smither & Co., Inc. v. Coles*, 242 F. 2d 220 (C.A.D.C.).] ¹¹

¹⁰ The Court then ruled against the claim for contractual indemnity on the ground that it was not cognizable under the Tucker Act jurisdiction of the district courts but would have to be brought in the Court of Claims.

¹¹ See also *Thol v. United States*, 218 F. 2d 12 (C.A. 9).

B. CASES UNDER SECTION 5 OF THE LONGSHOREMEN'S AND HARBOR WORKERS' ACT

1. Actions relying upon a noncontractual right

Section 5 of the Longshoremen's and Harbor Workers' Act, 33 U.S.C. 905, provides, in pertinent part, that "[t]he liability of an employer [for compensation] * * * shall be exclusive and in place of all other liability of such employer to the employee * * * and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death." Again, the overwhelming weight of authority supports the proposition that there may be no recovery of contribution from a negligent employer subject to the Act.

Here, as under Section 7(b) of the Federal Employees Compensation Act, several reasons for denying contribution have been stressed. This Court, as noted above, has emphasized the statute's reimbursement provisions, which are similar to those found in the Federal Employees' Compensation Act. *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406, 412. Other courts have relied upon the "exclusive liability" provisions and the purpose of preserving the employer's *quid pro quo*—freedom from tort liability—obtained in exchange for incurring an absolute liability to pay compensation. "Were the rule otherwise," the Third Circuit has said:

the employer could be made to respond indirectly in tort for damages for which he would not be answerable under the Longshoremen's and Harbor Workers' Act. Such a rule would be violative of Section 5 of the Act as well as

of the spirit of the entire statute whereunder an employer's duty to pay compensation to his injured employees without regard to negligence is substituted for his common law tort liability. Cf. *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406, 412, 74 S. Ct. 202. [*Brown v. American-Hawaiian S.S. Co.*, 211 F. 2d 16, 18.]

The Second Circuit has similarly pointed out that the employer's

statutory liability to the libellant for compensation under the Longshoremen's Act is "exclusive," 33 U.S.C.A. § 905, and to permit contribution would be to permit the libellant to evade the statutory command by making of the negligent third party a "conduit" for the recovery of damages from his employer in excess of the statutory compensation. [*Lo Bue v. United States*, 188 F. 2d 800, 802.]¹²

And the District of Columbia Circuit, sitting *en banc*, has reached a similar conclusion, overruling its earlier decision in *Hittaffer v. Argonne Co.*, 183 F. 2d 811, and denying a third party's claim for loss of consortium, in an extended opinion carefully reviewing both the language and purposes of the "exclusive liability" provisions of the Longshoremen's Act. *Smither and Co., Inc. v. Coles*, 242 F. 2d 220.¹³

¹² See, also, *American Mutual Liability Insurance Co. v. Matthews*, 182 F. 2d 322, 324 (C.A. 2): "To impose a noncontractual duty of contribution on the employer is *pro tanto* to deprive him of the immunity which the statute grants him in exchange for his absolute, though limited, liability to secure compensation to his employees."

¹³ The cases from State courts involving contribution among joint tortfeasors are in substantial accord. See 2 Larson, *The Law of Workmen's Compensation*, Section 76.21:

"The great majority of jurisdictions have held that the employer whose concurring negligence contributed to the em-

2. Actions relying upon a contractual right of indemnity

The cases upon which petitioner places its principal reliance are not in point. Petitioner reluctantly acknowledges that the Court "emphasized" in *Ryan Stevedoring Co. v. Pan-Atlantic Steamship Corp.*, 350 U.S. 124, *Weyerhaeuser Steamship Co. v. Nacirema Operating Co.*, 355 U.S. 563, and *Crumady v. The Joachim Hendrik Fisser*, 358 U.S. 423, "that the third party was granted recovery against the negligent employer because the two were in a contractual relationship." Brief, page 16. Petitioner also concedes that "The facts of the instant action present no contractual relationship between the private shipowner and the government." *Id.* at 17. Petitioner's reliance on these cases is, baldly stated, premised on the proposition that the distinction they carefully preserve between a contractual right of indemnity and a noncontractual right of contribution or indemnity founded upon a tort is misleading verbiage used for the twofold purpose of (1) obscuring the decision of issues of statutory immunity under the Longshoremen's Act and (2) overruling without discussion this Court's limitation of the doctrine of contribution in *Halcyon Lines v. Haenn Ship Corp.*, 342 U.S. 282.

Petitioner's reliance on these cases falls with the premise on which it is based. This Court meant what it said in *Ryan* when it stated (350 U.S. at 133):

ployee's injury cannot be sued or joined by the third party as a joint tortfeasor, whether under contribution statutes or at common law."

Because [the ship] * * * relies entirely upon [the employer's] contractual obligation, we do not meet the question of a non-contractual right of indemnity or of the relation of the Compensation Act to such a right.¹⁴

The terms of the Court's remand in *Weyerhaeuser* make equally clear the limitation of the Court's decision to contractual indemnity (355 U.S. at 569):

In view of the new trial to which petitioner is entitled, we believe sound judicial administration requires us to point out that in the area of contractual indemnity an application of the theories of "active" or "passive" as well as "primary" or "secondary" negligence is inappropriate.

Finally, there is nothing in the Court's later decisions to indicate that its reliance upon a theory of contractual indemnity is without significance.¹⁵

C. THE HARTER ACT CASES DO NOT JUSTIFY PETITIONER'S CLAIM FOR CONTRIBUTION

Petitioner also relies (Brief, pp. 22-23) upon *The Chattahoochee*, 173 U.S. 540, insisting that it demonstrates that the divided-damages rule in admiralty has

¹⁴ See also *id.* at 132, note 6: "We do not reach the issue of the exclusionary effect of the Compensation Act upon a right of action of a shipowner under comparable circumstances without reliance upon an indemnity or service agreement of a stevedoring contractor."

¹⁵ The two later cases applying the *Ryan* doctrine, *Crumady v. The Joachim Hendrik Fisser*, 358 U.S. 423, and *Waterman Steamship Corp. v. Dugan & McNamara, Inc.*, 364 U.S. 421, merely confirmed the contractual basis on which *Ryan* depends. In *Crumady* the doctrine was extended to benefit the shipowner as a third-party beneficiary, the contract containing the steve-

a "special nature" which gives it precedence over the exclusivity provision of the Compensation Act. In that case, notwithstanding the Harter Act, 27 Stat. 445, 46 U.S.C. 190, *et seq.*, which precludes a recovery by the cargo against the carrying vessel for damage to the cargo, a non-carrying vessel which had been involved in a mutual-fault collision with the carrying vessel and had been held liable to the cargo for damage thereto was allowed contribution, with respect to the cargo damage, from the carrying vessel.

We submit that this decision rests upon considerations limited to the Harter Act. Both the language and the legislative history of that Act, which deals only with liability for cargo, are markedly different from the language and history of the Federal Employees' Compensation Act. To begin with, the language of the former is far less compelling. It does not provide that the statutory liability shall be "exclusive," nor does it command that this liability shall be "in place of *all* other liability" (emphasis added). The Harter Act contains no reimbursement provisions like those found in the Federal Employees' Compensation Act, which show clearly that the statutory limitation of liability cannot be affected by the innocent party's right to sue third parties. Most important of

dore's warranty of workmanlike service having been entered into between the stevedore company and the charterer of the vessel, instead of its owner. In *Waterman* the doctrine was held to benefit the shipowner when a cargo consignee, and not the shipowner, had contracted for the stevedore services. Each of these cases results in recovery only because of the stevedore's breach of his "warranty of workmanlike service," an exclusively contractual basis for indemnification.

all, both the language of other sections of the Harter Act (46 U.S.C. 190-191) and its legislative history (see *The Delaware*, 161 U.S. 459, 471-474; *United States v. Atlantic Mutual Insurance Co.*, 343 U.S. 236) show unequivocally that the Harter Act was intended to deal with one limited facet of the problem of a carrier's liability to its cargo—the problem of contractual waivers of liability between a carrier and its cargo—and was not intended to work a pervasive change in the entire structure of liability and compensation for losses. There can be no doubt that the Federal Employees' Compensation Act was, in contrast, intended to work such a pervasive change in the structure of liability for employee injuries, substituting compensation as a cost of doing business for the prior concepts of liability for fault alone and effecting such changes in the body of prior case law as were necessary to protect the balance established by this newly created system of compensation.

In light of the totally dissimilar purposes of the two statutes and the differences in language and reimbursement provisions, it is not surprising that the lower courts have found that the liability-limiting provisions of the two statutes have different scopes. There are many justifications for such a distinction, but the considerations at the root of it have nowhere been more succinctly stated than in Judge Learned Hand's concurring opinion in *American Mutual Liability Ins. Co. v. Matthews*, *supra*, a decision which denied contribution on the strength of the immunity provisions of the Longshoremen's Act. Judge Hand pointed out that prior to the enactment

of the Harter Act the shipowner could not contract away his liability for negligence, but could, by contract, relieve himself from the duty to furnish a seaworthy ship. The Harter Act relieved him from liability for negligence where he used due diligence to man and equip the ship, and only required in return that he give up his privilege to contract away his duty to furnish a seaworthy ship. The Harter Act was a balance of advantage and disadvantage, but it was a balance under which the carrying ship actually obtained more than it surrendered upon passage of the Act (182 F. 2d at 326) :

Thus, the effect of the doctrine of *The Chattahoochee, supra*, was that the sum of these changes in the owner's duties was not enough to justify extending the release beyond direct claims of shippers. Whether, as *res integra*, that was right, is not important here; what is important is that the balance between the changes made there as a condition of the release, was very different from a similar balance in the case at bar. It is for these reasons that I do not think the *Chattahoochee, supra*, a precedent.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the court below should be affirmed.

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OCTOBER, 1962.

APPENDIX

The reimbursement and subrogation provisions of the Federal Employees' Compensation Act, Sections 26 and 27, 39 Stat. 747, 5 U.S.C. 776-777, as set forth in the United States Code, provide:

§ 776. Subrogation of United States to employee's right of action; assignment by employee; disposition of money collected from person liable.

If an injury or death for which compensation is payable under sections 751-756, 757-781, 783-791 and 793 of this title is caused under circumstances creating a legal liability upon some person other than the United States to pay damages therefor, the Secretary may require the beneficiary to assign to the United States any right of action he may have to enforce such liability of such other person or any right which he may have to share in any money or other property received in satisfaction of such liability of such other person, or the Secretary may require said beneficiary to prosecute said action in his own name.

If the beneficiary shall refuse to make such assignment or to prosecute said action in his own name when required by the Secretary, he shall not be entitled to any compensation under sections 751-756, 757-781, 783-791 and 793 of this title.

The cause of action when assigned to the United States may be prosecuted or compromised by the Secretary, and if the Secretary realizes upon such cause of action, he shall apply the money or other property so received in the following manner: After deducting the amount of any compensation already paid to the beneficiary and the expense of such reali-

zation or collection, which sum shall be placed to the credit of the employees' compensation fund, the surplus, if any, shall be paid to the beneficiary and credited upon any future payments of compensation payable to him on account of the same injury.

§ 777. Adjustment in case of receipt by employee of money or property in satisfaction of liability of third person.

If an injury or death for which compensation is payable under sections 751-756, 757-781, 783-791 and 793 of this title is caused under circumstances creating a legal liability in some person other than the United States to pay damages therefor, and a beneficiary entitled to compensation from the United States for such injury or death receives, as a result of a suit brought by him or on his behalf, or as a result of a settlement made by him or on his behalf, any money or other property in satisfaction of the liability of such other person, such beneficiary shall, after deducting the costs of suit and a reasonable attorney's fee, apply the money or other property so received in the following manner:

(A) If his compensation has been paid in whole or in part, he shall refund to the United States the amount of compensation which has been paid by the United States and credit any surplus upon future payments of compensation payable to him on account of the same injury. Any amount so refunded to the United States shall be placed to the credit of the employees' compensation fund.

(B) If no compensation has been paid to him by the United States, he shall credit the money or other property so received upon any compensation payable to him by the United States, on account of the same injury.

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OF THE
United States

OCTOBER TERM, 1962

No. 65

WEYERHAEUSER STEAMSHIP COMPANY,
Petitioner,

VS.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals
for the Ninth Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

- I. **THE EXPRESS WORDS OF LIMITATION "HIS LEGAL REPRESENTATIVE, SPOUSE, DEPENDENTS, NEXT OF KIN . . ." RESTRICT THE "EXCLUSIVITY" PROVISION OF SECTION 7(b) TO DIRECT ACTIONS BROUGHT BY THE EMPLOYEE OR HIS BENEFICIARIES.**

By mere repetition of a phrase—"anyone otherwise entitled to recover damages . . ."—respondent attempts to convince the Court that "the express terms" of Section 7(b) of the FECA preclude application in this case of the accepted divided damages rule in admiralty. Respondent, however, conveniently ignores the accepted rules of statutory construction set forth in Brief for Petitioner at pp. 6 and 7, and blandly attempts to dismiss the limit-

ing words of Section 7(b) by implying that "the Senate version" did not contain them. Respondent's dread of the words of limitation in the statute is illustrated by its failure to quote them when purporting to recite the "explicit" provisions of the statute at pp. 8, 9 and 10 of its brief. Each recitation omits the words of limitation "his legal representative, spouse, dependents, next-of-kin . . ."

The decisions of the circuit courts cited in footnote 8 at p. 25 of Brief for the United States are not determinative of the issue herein. They merely confirm the effect of the words of limitation in Section 7(b) that the employee and his direct beneficiaries have no common law rights against the employer.

II. THE LEGISLATIVE HISTORY OF THE 1949 AMENDMENTS REVEALS NOT AN IOTA OF EVIDENCE THAT CONGRESS INTENDED RESPONDENT'S ASTOUNDING CONCLUSION THAT THE THIRD PARTY BEAR THE ENTIRE BURDEN FOR BOTH THE NEGLIGENT EMPLOYER AND INJURED EMPLOYEE.

Respondent has made no effort to contradict the fact set forth in Brief for Petitioner at pp. 9-12 that in the legislative history of the 1949 amendments to the FECA there is not a shred of evidence that Congress intended to alter existing third party rights. In its discussion of the legislative history of Section 7(b) respondent ignores the fact that the phrase "unless otherwise specifically provided by law" was stricken from the original committee version of the "exclusivity" provision. The only logical conclusion following from that revision of the section is that the committee did not wish to place the burden of establishing the survival of existing rights and remedies on the party asserting them.

Petitioner has no quarrel with respondent's extended discussion of the rationale of so-called "exclusivity" provisions in workmen's compensation statutes. It agrees that the employer in exchange for guaranteeing the employee compensation receives a *quid pro quo* of limited liability *with respect to direct actions by the employee or his direct beneficiaries*. This policy, however, does not determine the issue of the negligent employer's liability to third persons such as petitioner, who has received no *quid pro quo* in the statute. Similarly, the fact that *The Atlas* (1876) 93 US 302 and *The Juanita* (1876) 93 US 337 held that the innocent victim of a collision could recover full damages from either of the negligent vessels is not determinative of the equities herein. Both cases specifically recognized the moiety rule of damages as between the two vessels, and it is patent from the opinions of this Court that the results were predicated on the ability of the single vessel against whom a judgment was rendered to add the judgment to the damages to be divided. Section 7(b) of the FECA has the effect of eliminating the injured employee's remedy against his own vessel, when it is operated by the United States Government. The statute clearly does not, however, alter the *substantive right* of the other vessel to share *all damages* according to the accepted rule.

Respondent at p. 18 of Brief for the United States also asserts that the fact that the act gives the employer a lien against any common law recovery of the employee to the extent of the employer's compensation payments is conclusive evidence that Congress intended no third party recovery. Respondent then concludes:

It follows, *a fortiori*, that no employee would be allowed to increase his recovery by a tort action if

the result would be to impose upon the United States a liability *in excess of* that imposed by the statute.

Ryan Stevedoring Company v. Pan-American Steamship Corp. (1956) 350 US 124, and the cases following it, specifically refute respondent's reasoning and statement. In these cases the employee's tort action against the third party in fact increased the negligent employer's liability beyond that provided by the compensation act. The same reason and justice as prevailed in *Ryan* argue that the accepted admiralty principle of divided damages and the express policy of Congress in the Public Vessels Act, 46 USC 781 *et seq.*, not be altered by indirection.

III. ABSENCE OF A CONTRACTUAL RELATIONSHIP BETWEEN PETITIONER AND RESPONDENT SHOULD NOT AFFECT PETITIONER'S RIGHT TO RECOVERY FROM THE NEGLIGENT EMPLOYER UNDER THE ACCEPTED DIVIDED DAMAGES RULE.

Respondent attempts to dismiss this Court's considered decision and reasoning in *Ryan Stevedoring Company, Inc. v. Pan-Atlantic Steamship Corp.*, *supra*, and cases following it, wherein the shipowner was permitted to recover full indemnity from the negligent stevedore employer. Respondent fails to justify a moral or logical reason for a different result in this action. Respondent argues at p. 31 of its brief that these cases are not in point because the decisions emphasized the contractual relationship of shipowner and stevedore. In its brief petitioner states at p. 17—and respondent makes no effort to refute this proposition—that "There is every indication in the *Ryan* opinion . . . that this Court employed 'con-

tract' vocabulary in order to reach an equitable result without expressly overruling *Halcyon Line v. Haenn Ship Ceiling and Refitting Corporation* (1952) 342 US 282....' The Ninth Circuit has recently endorsed petitioner's statement in *Italia Società Per Azioni di Navigazione v. Oregon Stevedoring Company, Inc.*, No. 17,616, decided October 25, 1962, where, in ruling on the standard of liability to be applied to the stevedoring company being charged with breach of its warranty of workmanlike service, the Court commented on the *Ryan* decision at p. 8: "If the shipowner was to be relieved at all from the onerous burden of *Halcyon*, liability against the stevedoring company for its wrongs would necessarily have to be predicated upon contracts and not tort." Similarly, the right of petitioner to recover one-half of the settlement with Ostrom arises out of the failure of respondent in its duty to petitioner to navigate safely or share the result of its negligence according to the accepted/divided damages rule.

Respondent accuses petitioner at p. 31 of its brief of "overruling without discussion this Court's limitation of the doctrine of contribution in *Halcyon Lines v. Haenn Ship Corp.*, 342 US 282." In making this startling statement, respondent ignores the fact that petitioner in this case merely seeks application of the accepted moiety rule between mutual wrongdoers in a both-to-blame collision. That rule is emphasized and specifically recognized in the *Halcyon* decision, in which the Court stated:

Where two vessels collide due to the fault of both, it is established admiralty doctrine that the mutual wrongdoers shall share equally the damages sustained

by each, as well as personal injury and property damage inflicted on innocent third parties. 342 US 282, 284.

In the *Halcyon* case this Court specifically refused to accept the employer's defense that the so-called "exclusive" liability provision (Section 5 of the Longshoremen's and Harbor Workers' Act) nearly identical to the one in issue herein prevented the third party from recovering from the negligent employer. The Court recognized that the "exclusivity" provision did not resolve the issue of third party rights against negligent employer.

CONCLUSION

Petitioner respectfully submits for the above reasons that this Court should reverse the decision of the Court of Appeals and order reinstated the decision of the District Court that the settlement paid to Ostrom be included as an item of damages to be divided according to the accepted rule.

Dated, San Francisco, California,

November 19, 1962.

Respectfully submitted,

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